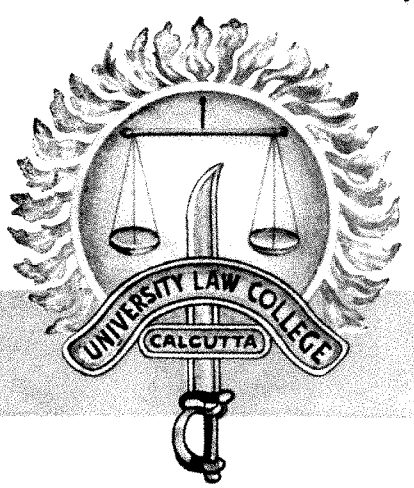
UNIVERSITY LAW COLLEGE Magazine

CALCUTTA

VOL. XXII MARCH, 1954



EDITOR-IN-CHIEF
PROF. P. C. CHUNDER, M.A., LL.B.

EDITOR
SRI AJIT CHATTERJEE, M.A.

UNIVERSITY LAW COLLEGE

MAGAZINE

1954

Editor-in-Chief :
Prof. P. C. CHUNDER, M.A., LL.B.

Editor :
AJIT CHATTERJEE, M.A.

From Unreal lead me to Real,
From Darkness lead me to Light,
From Death lead me to Immortality.

—*Vrihadaranyaka.*

Contents :

PAGE

MESSAGE FROM THE CHIEF JUSTICE OF INDIA 5
EDITORIAL—A. K. C. 7
THE ROSENBERG CASE—D. N. PRITT, Q. C. 13
RELIANCE ON GRATUITOUS PROMISES—Prof. Roscoe Pound, A. M., Ph. D., LH. B., J. U. D. 18
SHAKESPEARE AND LAW—Hon'ble Mr. P. B. Mukharji, Justice, Calcutta High Court. 30
"SPEAKING CONSTITUTIONALLY"—Hon'ble Mr.D. N. Sinha, Justice, Calcutta High Court. 37
ROLE OF THE OPPOSITION IN PARLIAMENT—Prof. Hiren Mukherjee, M. A. (Cal. et Oxon) B. Litt. (Oxon) Barrister-at-Law, M. P. 41
ON THE PROPOSED AMENDMENTS TO THE CRIMINAL PROCEDURE CODE—Sri Ajit Kumar Dutta, Advocate (Ex-Student) 44
FUNDAMENTAL RIGHTS IN A WELFARE STATE—Professor Asoke Sen, M.A., LL.M. ... 48
SYMPHONY IN JUSTICE—Professor S. A. Masud, M.A., LL.B., Barrister-at-Law ... 52
HOW FUNDAMENTAL ARE OUR FUNDAMENTAL RIGHTS—Sri Sadhan Chandra Gupta, M. A., LL. B. Barrister-at-Law, M.P., (Ex-Student) 54
RAMAYANA & THE MODERN LAWS—Sri B. C. Sen, M.A., LL.B., (Ex-Student) ... 58
DEMOCRATIC LAWYERS' MOVEMENT—Sri A. P. Chatterjee, Secretary, West Bengal Democratic Lawyers' Association 61
ON THE POSSIBILITY OF A UNIFORM CIVIL CODE IN INDIA— Dr. Rama Chandra Pal, M.A., D.Phil. (Third Year Student) 63
GREEK CONCEPTION OF JUSTICE—Sri Tarun Chandra Dutt, (Second Year Student) ... 65
EMERGENCY PROVISIONS UNDER THE CONSTITUTION—Sri Subir Chandra Majumdar M.A., (Research Scholar, Calcutta University), (Third Year Student) 67
LAW—IN GUARD OF PEACE—Sri Jahar Sen (Second Year Student) 69
EVOLUTION OF INCOME-TAX ACT IN INDIA & JURISDICTION OF COURTS—Sri Ajit Chatterjee, M.A., B.Com., (Third Year Student) 72
CONCEPTION OF LAW IN THE SOVIET UNION—Sri Rathindra Kr. Chakraborty, (Second Year Student) 75
THE INDIAN PRESIDENT VIS-A-VIS PARLIAMENTARY SOVEREIGNTY—Sri Sushil Bhowmik, (Third Year Student) 77
TAKE 'EM IN LIGHT VEIN—Compiled by Sri Pratyush Kumar Ghose, (First Year Student), Syed M. Murshed, (Second Year Student) 80
PRESS LAWS IN INDIA—Sri Anjan Kumar Banerjee (Second Year Student) ... 81
DOES HINDU WIDOWS' REMARRIAGE ACT PUT A PREMIUM ON IMMORALITY?—Sri Debabrata Ghoshal, (Third Year Student) 84
UNIVERSAL DECLARATION OF HUMAN RIGHTS— Sri Nihar Ranjan Dharchowdhury, (Second Year Student) 87
THE JUDICIAL SYSTEM IN MODERN JAPAN—Sri Ram Pada Das, (Third Year Student) ... 90
BUREAUCRACY IN THE MODERN DEMOCRATIC STATE—Sri R.K. Anand (Second Year Student) 92
NOTES OF THE SESSION—Sri S. Hore, M.A., (Third Year Student) 94
EVOLUTION OF LAW IN INDIA—Syed Mushtaque Murshed (Second Year Student) ... 99
MIMANSA RULES OF INTERPRETATION—Avinas Ch. Guha, M.A., B.L., Late Professor of Hindu and Constutitional Laws, University Law College, Calcutta. 102
A BIRD'S EYE-VIEW OF THE PROPOSED CHANGES IN THE INDIAN COMPANY LAW—Sri Pranabesh Mitra (Second Year Student) 114

CONTENTS—(*Continued*)

ARTICLE 286 OF THE CONSTITUTION OF INDIA—DISCUSSED IN PART—Sri Sunil Kumar Saha, (First Year Student) 115
REVIEW OF THE LEGAL CONFERENCE—The Magazine Sub-Committee 118
UNION NOTES—Compiled by: Sri Hrishikesh Sarkar, General Secretary, Calcutta University Law College Union 120
ANNUAL REPORT OF THE LAW COLLEGE ATHLETIC CLUB 1953-54 129
ANNUAL REPORT OF THE CALCUTTA UNIVERSITY LAW COLLEGE GYMNASIUM ... 130

CALCUTTA UNIVERSITY LAW COLLEGE UNION

WORKING COMMITTEE

SESSION 1952-54

President—Professor S. A. Masud

Vice-President & Treasurer—Professor S. K. Mitter.

Vice-President & Editor-in-Chief—Professor Pratap Chandra Chunder.

Vice-President—Professor B. N. Mukherjee.

General Secretary—Sk. Sajjad Ali (Retired)
Sri Hrishikesh Sarkar

Assistant General Secretary—Sri Sanat Kumar Bose.

Joint Secretaries (*Re-Union*)—Sri Subodh Dasgupta
Sri Ranajit Kumar Sanyal (Retired)

Joint Secretaries (*Debate*)—Sri Jahar Sen
Sri Dharambir Lal

Joint Secretaries (*Magazine & Forum*)—Sri Ajit Kumar Chatterjee.
Sri Bidyut Kumar Sen (Retired).

Joint Secretaries (*Social & Drama*)—Sri Anil Sen
Sri Ramen Mukherjee
Sri Ashit Roychowdhury

Joint Secretary (*External Affairs*)—Md. Taha Ashique

Joint Secretary (*Cultural & Legal Conference*)—Sri Anil Kumar Kaunda

Joint Secretary (*Students' Aid Fund*)—Sri Dulal Mukherjee

Joint Secretary (*Social Services*)—Sri Mahendra Ghosal

CALCUTTA UNIVERSITY LAW COLLEGE UNION

WORKING COMMITTEE 1952-54

Sitting (L. toR.)—Sri Hrishikesh Sarker (Genl. Secy.), Prof. B. N. Mookerjee (Vice-President), Prof. Pratap Ch. Chunder (Vice-President & *Editor-in-chief*) Prof. S. A. Masud (President), Dr. P. N. Banerjee (Principal), Sri S. N. Banerjee (Vice-Chancellor), Sri A. C. Karkoon (Vice-Principal) Prof. S. K. Mitter (Vice President & *Treasurer*), Srj Mohendra Nath Ghosal (Jt. Secy. Social Services), Sri Ajit Chatterjee (Jt. Secy. Magazine & Fordm & *Editor*), Sk Sajjad Ali (Retd. Genl Secy.)

Standing (L. to R.)—R. P. Sing (Bearer), Sri Jahar Sen (Jt. Secy. Debate), Sri Dulal Mookerjee (Jt. Secy, Student's Aid Fund), Sri Subodh Dasgupta (Jt. Secy. Re-union), Sri Dharambir Lal (Jt. Secy. Debate), Sri Anil Kaunda (Jt. Secy. Cultural & Legal Conference), Md, Taha Ashique (Jt. Secy. External Affairs), Sri Anil Sen (Jt. Secy Social & Drama), Sri Sarat Kumar Basu (Asst. Genl. Secy.), Abdul Sovan (Dufftary), Gonnri Ram (Bearer).

Absentees —Sri Asit Roy Chowdhury (Jt. Secy. Social & Drama), Sri Ramen Mookerjee (Jt. Secy. Social & Drama).

MESSAGE FROM THE CHIEF JUSTICE OF INDIA

सत्यमेव जयते

CHIEF JUSTICE OF INDIA
SUPREME COURT

New Delhi, the March 13, 1954

Dear Mr. Chatterjee,

I am glad to learn that your annual magazine will come out by the end of next week. I am always interested in the writings of persons interested in law. I wish your magazine a great success and I hope it will help in the advancement of scientific study of law and in inculcating the habit of hard work amongst lawyers.

With kindest regards and best wishes.

Yours sincerely,

F I

UNIVERSITY LAW COLLEGE MAGAZINE
CALCUTTA

Vol. XXII MARCH, 1954

Editorial

About a decade ago our illustrious Principal, Dr. P. N. Banerjee expressed in the pages of this magazine, his great hope that the day was not far off when this magazine will attain the high standard of the Harvard Law Review. In voicing this aspiration of all of us, he definitely laid down the lofty ideal—the high goal to aim at—for all succeeding compilers of this magazine. It has been those blessed words—that worthy ideal—of our Principal that have inspired us in our task.

We can say at least this much that we have tried our utmost in our humble way to fulfil this task. We have tried to add a review of our own to each article. We have also endeavoured to make the magazine truly representative of the views of the students of this College. In doing all this how far we have been able to make our work an approximation to the above ideal, it is for our generous readers to decide.

IN REMEMBRANCE

Marshall Stalin is dead. In his death the world has become a distinctly poorer place to live in. He was not only the greatest leader of the October Revolution and of the great Russian people, he was also the greatest champion of the cause of the lowly and the poor, wherever they are, and one of the most far-sighted statesmen of all times. If doing the greatest good of the greatest number is the measure of true nobility, he was the noblest governmental leader of our times. Moreover, as our Prime Minister Sri Nehru said, he was a man who exposed the cause of world peace and firmly hated all wars.

We bow down our heads in deepest respect before the memory of this great leader.

* * *

Another great captain has fallen.

The tragic end of Dr. Syamaprasad Mukherjee in detention at Srinagar has been a great shock to us. In his death the country has lost a great statesman and one of its greatest educationists. Indeed the detention of a leader of so strong and magnetic a personality and detention far away from his homeland and, above all, detention without trial, are all great departures not only from the usual rights conferred in our constitution but also from the underlying principles of a free nation.

To us he was not only a politician. He had close connections with our beloved *Alma Mater* and with this college of ours. He was an outstanding student of this institution and afterwards he became one of its most distinguished teachers. We silently pay our great respect and homage to the departed soul. We also offer our condolences to the bereaved family.

* * *

We have lost another great thinker—Dr. M. N. Roy. Led by the burning fire of revolution within him, this great son of Bengal organised in Mexico, in the beginning of this century, some of the first Communist revolutions of our times. Since then he had taken

active part in almost all the major revolutions of the world.

He was one of the most scholarly and stimulating writers of modern India. In his turbulent life he was a great general. In death may his soul rest in peace.

* * *

In the past year we have also lost Prof. H. L. Chakrabarti, Prof. K. K. Basu, and Prof. Ajoy Ch. Dutta. While all of them were Professors of our college some time or other, Mr. Dutta was also the President of our Union from 1933-35.

Through this column we pay our respects to the departed souls.

MATTERS CONCERNING US

Change of syllabus

As regards the teaching of law in our college we have certain important points to make.

At the outset we must complain about our present syllabus. Proposals for appropriate changes in our syllabus have been in the air for quite a long time. But unfortunately as yet they have come to nothing. It has been the considered opinion of a vast majority of the students and also of many of our professors that, in the course for Preliminary Examination, Roman law and the Lex Aquilia ought to be replaced by some other subject which will be less antiquated and more useful to law-students of to-day. Elements of Company law or the Mohamedan Law, which is now in the Intermediate course, may well fill up this gap. Again, in the course for Intermediate Examination, the study of the English Law of Real Property is equally useless. In its stead the Law of Trusts may be introduced here instead of in the third year, and the Law relating to Property may also fill up the gap left by Mohamedan Law. This will considerably lighten the course for the Final Examination, in which important legislations of recent times like the Press Act and the Estate Duty Act may be introduced most profitably.

In short, we would earnestly request our authorities to revise our present syllabus in the light of the present-day needs of a student of law who intends to enter the legal profession.

LL. M. Couse

As regards LL. M. course we suggest that a few classes should be introduced for students appearing in this examination. This would encourage more students to go in for this course.

Tagore Law Lectures

Furthermore, although there is a provision for the holding of an examination amongst our students on the subject of the Tagore Law Lecture delivered each year, no such examinations have been held for about a decade. We submit that the authorities should start holding this examination as soon as possible.

Moreover, at present Tagore Law Lectures are delivered 5 years behind the corresponding academic year. This anomalous position should be progressively rectified by holding more than one Tagore law lecture annually for a few years.

The University must also arrange for prompt publication of the Tagore Law lecture delivered each year.

Research Works.

"India lacks academic lawyers", observes the Chief Justice of the Calcutta High Court. "The very few research works so far published", continues the Chief Justice, "had been of the most rudimentary character." While we fully appreciate the observation, it will not be just out of place to try to find out the cause of the situation.

At present there is no incentive for lawyers to take up serious research work. The greatest honour that the Faculty of Law can offer is a 'Tagore Law lecturership.' In the Western countries 'chairs' are maintained for the academic lawyers. No such arrangement has yet been made in this country so that intending workers may be relieved of monetary difficulties and may engage wholeheartedly in research work.

This is possibly one of the main reasons why inspite of her having eminent lawyers in the bar and the bench, India has not produced recently even one Holland, Maine or Roscoe Pound.

It is only when such 'chairs' are established that systematic study and research works under eminent lawyers on different branches of legal system become possible.

Shifting of Law College—

A sparrow has been whispering for a long time that our Law College is going to be shifted to some more suitable place. But we have not yet heard of any concrete proposal, though rumour has it that it will be shifted to some northern suburb of Calcutta. While we fully appreciate the environmental advantages of any such change of seat, we also think that the authorities must keep in mind the convenience of the students in their journey to and from such a place.

LAWYERS' ROLE

At the eleventh session of the Bengal and Assam Lawyers' Conference held at Midnapore and the ninth session of the U. P. Lawyers' Conference held at Benaras on December 25, 1953, some points on the role of Lawyers in new India were discussed. At Midnapore it was observed that "...the Lawyer of the present day does not hold the great place that he held in public life in the past", while Benaras Conference resolved that ".....now he (the lawyer) sometime appears as an *impediment in the path of Progress*".

Obviously we are inclined to form a gloomy picture of the future. But even then we can not support these observations. Lawyers played a conspicuous part in the struggle for independence and there is no reason why they should be out of place if today they can proceed with the progress of society. Moreover, the most important function of the lawyer is to reconcile the legal system to the changing structure of the society. This is no easy task and by performing this task lawyers help in social progress. So we fail to understand how at this transitional period lawyers can be regarded as impediments in the path of progress. As no less a person than Sri P. B. Chakrabarti, Chief Justice of the Calcutta High Court, says—"If eternal vigilance is the price of liberty, there must be some one to keep the vigil. It is on the lawyers that that sleepless task has fallen".

Law Courts in New China—

Reference may be made here to the functions of lawyers of New China where new laws have been adopted to suit the changed conditions. The authorities there, being approached for information regarding the recent changes in the legal system, informed us that ".....the law-making can come from either the people themselves or from an oligarchy. In the former case—it is a matter of gradual evolution and would therefore take time. .....Our system is still in the making.....We have.....special people engaged in legal work....."

In the hands of these people, the judicial system of New China has undergone revolutionary changes.

One of the new features of the courts is the system of People's Assessors, instituted in accordance with the Governments' Provincial Regulations on the organisation of People's Courts. Any popular organisation may be asked to choose one or two persons who sit as assessors in a given case. So a distinctive characteristic of the New Law Courts of China is their close association with the people.

Another feature of the new system provides for travelling judges who try cases on the spot. A series of circuit courts have been established. This has made justice inexpensive and prompt in New China. And the courts now use every channel to assist the people to grasp both the letter and the spirit of the law.

Thus, in that country the importance of the role of lawyers is so much appreciated that they are now regarded as "Defenders of Peoples' Rights" and are engaged by the state to work for the people. There the lawyers have played an important role and have helped to clear up the path of progress to usher in the new era.

Re-orientation of World Law—

On 28th December, 1953, an International Conference of eminent jurists and constitutional experts of 25 countries to consider the reform of International Law and revision of the U. N. Charter was held in the Central Hall of Parliament House, New Delhi. The Conference was presided over by the then Chief Justice of India, Sri Patanjali Sastri.

The Conference—first of its kind held on Asian soil—was organised by the Indian Branch of the International Law Association formed over 80 years ago in Brussels. The value of such a Conference at the present

moment can hardly be over estimated. Re-orientation of International Laws is a great necessity to-day.

Democratic Lawyers' Movement—

The West Bengal Democratic Lawyers' Association has been formed as the State counterpart of the International Association of Democratic Lawyers of which Mr. D. N. Pritt, Q.C. is the president. Elsewhere in this magazine, the secretary of the said association has presented to us the aims and objects of the movement of Democratic Lawyers. We wish all success to the organisation and hope that it will keep up its high ideals.

RECENT LAW REFORMS

Criminal Law—

Coming to matters of national importance, the draft memorandum of the Union Home Ministry embodying proposals for judicial reforms deserve serious study. The proposals centre on three important aspects of the system namely, reduction in the cost of litigation, removal of *law's delay* and, finally, establishment of judicial panchayats in the rural areas. For achieving the first object court fees and lawyers' fees etc., are sought to be reduced. This step will have the support of every right thinking person. But the other steps contemplated in the draft proposal *e.g.* restricting rights of appeal in certain cases, establishing judical panchayats in village areas, are not equally harmless. The extremely serious implications of these sweeping steps have been made clear by Mr. Ajit Dutt, Advocate, in his article in this magazine . We earnestly request our administrators to think cooly and to take every aspect of such reforms under consideration before rushing through them.

Estate Duty Act, 1953—

Another piece of revolutionary legislation has been the Estate Duty Act, 1953. This Act came into force from October 15, 1953. If we recall that it was in 1925 that the then Taxation Enquiry Committee suggested the advisability of such a legislation, we cannot but say that the Act makes a rather delayed appearance in the Statute book.

Though it is difficult to comment on the Estate Duty Act before we have witnessed a few years of its working, yet we may point out that the rates of the duty might and ought to have been more steeply progressive and the provisions against evasion far more strict.

West Bengal Estate Acquisition Bill—

Another unusually delayed legal reform has been the passage of the West Bengal Estate Acquisition Bill. Most other states of the Indian Union have run ahead with their programmes for Zemindary abolition. West Bengal is, however, just making her start. However, we hope that the State Government will speedily go ahead with the implementation of the provisions of this admittedly inadequate Act.

Company Law Amendment—

On the 2nd September, 1953, the Finance Minister introduced in the House of the People a Bill to sonsolidate and amend the law relating to Joint Stock Companies in India.

The bill contains more than double the number of sections of the present Act and seeks to make some drastic changes in Company affairs. We reserve our comments on the bill for the present.

Income-Tax (Amendment) Act, 1953—

The comprehensive Bill introduced in 1951 with a view to give effect to the recommendations of the Income-Tax Investigation Commission,, has, at long last, come out in the form of Income-Tax (Amendment) Act, 1953. It is claimed that the Amendment Act confines itself to non-controversial matters, such as benefits to assesses, procedural provisions, prevention of evasion etc.

It is an axiomatic truth that most comprehensive measures should be introduced before we can expect income-tax law to be perfect. The enactment of the Amendment Act is not to be taken as an answer to that truth.

University Act, 1951—

At last the above act has come into force. So long the University was governed by the Act of 1904 which was described by the Radhakrishnan Commission as most undemocratic. Though in the act the due rights of Affiliated Colleges and ordinary graduates have been overlooked to some extent, it is expected that this new act will usher in a new era in the University affairs.

JUDGMENT OF ONE MAN COMMISSION

The report of the Commission of enquiry into the allegations of assault by the police on Pressmen on July 22, 1953, when they had assembled in the Maidan to discharge their normal duties, will give rise to much controversy. While the police have been absolved of all charges, Press reporters were found guilty of criminal offence under Section 186 I. P. C. and of breach of an order under Section 144-Cr. P.C.

It is contended that an "honest and independent Press is one of the "bulwarks of liberty." It is for the future to reveal whether the above report does not go against the cause of liberty.

LAW & LIBERTY

It is often argued that the present regime is conspicuously marked by the absence of civil liberties. The Executive is an oracle to the Legislature and the Legislature is the rope-dancer on the stage of the Executive. The result is that we have a Government not of laws but of men—a regime where rule of law has been sacrified to the rule of power.

In support of these views the statutes like Preventive Detention Act, Security Act, Maintenance of Public Order Act, Press Acts etc. passed in the different legislatures of India and affecting the civil liberties of the people are referred to.

Now our observation is that the powers conferred by these statutes on the Government are often misused and this drives public opinion against such statutes. We know that law is nothing but 'justice speeking to men through the voice of the State.' But when public opinion goes against it, there must be some defect in the law itself or in its application. In either case the Government is exposed to great risks and can continue to enforce such laws only at its peril. And it is the task of lawyers to come forward and point out where the defect lies and how it can be removed.

EVENTS OUTSIDE

The year under review has been mixed with the prospect of peace and war. There are only a few bright lights on political horizon of the world. Events in Korea have taken a new shape. Undoubtedly India undertook a great responsibility in accepting the chairmanship of the Neutral Nations Repatriation Commission. But the attitude of the South Koreans towards Indian Army personnel had been atonce painful and detrimental to the promotion of peace in that unquiet and war-torn land. We ardently hope that the world to-day will not succumb to another world war, particularly when all of us know that another such war will be destructive beyond imagination.

British Guiana and Kenya—

The recent happenings in British Guiana and Kenya demand more than a passing notice. Both on the issue of British Guiana and that of Kenya, the British Government has been guilty of violating Article ... Chap. XI of the U. N. Charter. Under these circumstances, India is quite competent to bring the "dispute" or the "situation" to the attention of the Security Council and the General Assembly as enjoined in Article 35 of the U. N. Charter. We think Indians ought to do so.

PAK—U.S. MILITARY PACT

As Prime Minister Nehru has so ably pointed out, this Pact will have the most serious repercussions on Indo-Pakistan relationship and is directly antagonistic to the sentiments of all Asian peoples. Prime Minister Mohamad Ali of Pakistan has said to the press that the American Military help will make it easier for his country to solve the Kashmir problem. This clearly reveals the *raison de etat* of Pakistan's eager acceptance of American arms aid. In this connection the American attempt to revive large scale semi-colonialism in Asia is clearly discernible. We are resolved that the days of Asian colonialism are over forever.

India's devotion to peace and her opposition to colonialism and imperialism of all sorts is not new. Besides, the years succeeding Sarajevo have clearly demonstrated the utter futility of wars and preparations for "wars to end wars", and the sooner nations realize the significance of this in this 'atomic' age the better will they subserve their ultimate interests.

OUR FELICITATIONS

We offer our felicitation to Sri Mehr Chand Mahajan on his appointment as the Chief Justice of India. On our onward journey

we have received a message from him which will be an inspiration not only to us but also to our successors ever afterwards.

We also felicitate Dr. J. C. Ghosh on his appointment as our Vice-Chancellor and assure him of our whole-hearted support.

We congratulate Sri Sadhan Chandra Gupta, a distinguished ex-student of our college, for his election to the House of the People. Inspired by lofty ideals, he will assuredly serve the people whom he represents.

To Mr. D. N. Pritt, Q. C. and Dr. Roscoe Pound, who made time amidst their mainfold activities to contribute articles to our magazine, we pay our deepest regards.

Our heartfelt thanks are also due to Hon'ble Mr. Justice P. B. Mukherjee, Hon'ble Mr. Justice D. N. Sinha, Prof. Hiren Mukherjee, Sri Ajit Dutta, Sri Sadhan Chandra Gupta, Sri B. C. Sen and Sri A. P. Chatterjee for their kind contributions to our magazine.

FOR OUR SUCCESSORS

The following persons could not contribute articles to this issue of our magazine. Most of them, however, have promised to contribute to any future issue. We take this opportunity to express our heartfelt thanks to all of them.

Mr. Rajani Palme Dutt—U.K.
Prof. G. W. Patton, Vice-Chancellor, Melbourne University.
Mr. Mullunajagam, Principal, Ceylon Law College.
Mr. Lalita Rajapakse, LL. D. Minister of Justice, Ceylon.
Mr. Chen-Hau-Sing, Vice-Chairman, Editorial Board, China Reconstructs, Peking.
Dr. Rajendra Prasad, President, Indian Union,
Dr. S. Radhakrishnan, Vice-President, Indian Union.
Sri C. C. Biswas—Law Minister, Govt. of India.
Sri Mehr Chand Mahajan, Chief Justice of India.
Sri Pantanjali Sastri—Ex-Chief Justice of India.
Sri S. R. Das, Judge, Supreme Court.
Sri Bijan K. Mukherjee, Judge, Suprime Court.
Sri P. B. Chakravarti, Chief Justice, Calcutta High Court.
Mr. Fazal Ali, Governor of Orissa.
Mr. S. M. Jaffar Imam, Acting Chief Justice, Patna High Court.
Mr. M. C. Chagla, Chief Justice, Bombay High Court.
Sri N. C. Chatterjee, Barrister-at-Law, M.P.

OUR THANKS

We are deeply grateful to our Principal Dr. P. N. Banerjee, Vice-Principal Sri A. C. Karkoon, our President Professor S. A. Masud, Vice-Presidents Professors P. C. Chundar B. N. Mukherjee and S. K. Mittra and also to Professor Asoke Sen for their valuable advice and suggestions.

Our Vice-Principal has kindly procured for us an illustrious article *i.e.*, 'Mimansa rules of interpretation' and Mr. D. N. Guha has kindly gone through the proof of that article. We take this opportunity to express our deepest thanks to them.

To the students in general we offer our heartiest thanks and congratulations for their keen interest in the publication of this magazine.

We are grateful to Sri Sudhindra Das Gupta, who contributed the Cartoons to our magazine and to Sri B. Mitra who took a keen interest in painting the coverpage. Sri Dasgupta and Sri Tarun Chandra Dutta have taken active part in many matters concerning the publication of the magazine.

We are also grateful to Sri Mrityunjoy Prasad Basu, the Superintendent of our college, and Sri Bijan Chakravarty and the staff of our college for their hearty co-operation in our work.

Lastly, we are grateful to Sri Bidyut Kumar Sen, Sri Nihar Ranjan Roy, Sri Pratyush Ghosh, Sri Durga Sahaya, Sri Niresh Chandra Bagchi, Sri Kanai Lal Koley, Sri Satyen Prasad Shaw, Sri Jahar Sen, Sri R. K. Anand and Syed M. Murshed who have gone through the proofs and performed other works relating to the publication of this magazine.

EPILOGUE

Now, we retire. But the blessed words of our Principal which inspire us on our journey also make us cautious. We are fully conscious of our drawbacks and short-comings. We however, will feel amply rewarded if our work inspires our successors to lift their standard of performance higher still.

A. K. C.

THE ROSENBERG CASE

By

D. N. PRITT, Q. C.

(Article Specially Contributed to the University Law College Mazagine, Calcutta.)

At present the Chief Counsel of famous Jomo Kenyatta case of Kenya and Rawalpindi Conspiracy Case of Lahore, MR. DENIS NOWELL PRITT, author of this brilliant article is one of the veteran senior members of the English Bar: Queen's (King's) Counsel since 1927. For many years a Labour M. P. and Chairman of the Howard League for Penal Reform and the Bentham Committee for Poor Litigants, he presided in September 1933, over the Reichstag Fire inquiry in London.

A review of the Rosenberg case by one of the outstanding figures in Anglo-Saxon jurisprudence will be, in our opinion, of great value to the lawyers and law students all over the country.—[Editor]

The "Rosenberg Case," as it is commonly called, was a prosecution in the Federal Courts of the United States of America of one Julius Rosenberg, his wife Ethel, and several other people, on a charge of conspiring, from June 1944 to June 1950, to obtain and communicate to the U.S.S.R. confidential information relating to the defence of the U.S.A. The information alleged to have been so obtained and communicated was alleged to relate to research work on the atom bomb.

It is interesting to note that, although the U.S. law said to have been infringed—an Act of Congress—permitted an allegation that the conspiracy was carried on "with intent to injure the U.S.A.", no such allegation was put forward, nothing more being asserted than an intent and belief that the information in question "would be used to the advantage of a foreign nation, to wit the U.S.S.R."

The trial took place in March, 1951; both Julius and Ethel Rosenberg were found guilty and sentenced to death. Nearly two and a half years later, after various appeals and motions for rehearing to appellate courts and petitions for reprieve— and after the indignant rejection by the Rosenbergs of an offer to spare the life of Ethel Rosenberg if they would confess and give information about the alleged espionage,—in respect of which they throughout protested their innocence, they were both put to death in the Sing Sing Prison at New York.

The case is of great human interest, due largely to the imposition and actual execution of a death sentence on a charge of conspiracy to do espionage not even alleged to injure the country; but the terribly long period which elapsed between the sentence and the execution, the calm nobility of the conduct, and particularly of the letters and statements of both Julius and Ethel during the two and a half years of suspense, and the grave doubts as to the fairness of the trial and the quality and nature of the evidence against them, all served to heighten the interest.

The case is of particular interest, also to lawyers and law students in India—as in Britain; for the legal system of the U.S.A., like that of India, derives from that of England, and Indian and British students alike can examine the proceedings with a great measure of technical understanding, and make the inevitable comparisons between what was done in New York in the Rosenberg case and what is done in political cases in their own countries with a pretty full knowledge of the field.

As I study the case, I find many grounds for grave disquiet. The passing and the actual carrying out of a death sentence, as I have already mentioned, are horrifying in themselves; but there is much more. Reading the case in the light of the general unstable and hysterical political atmosphere of 1951, I get more and more strongly the impression that the case was brought on weak and tainted evidence that in normal times and in a normal case would never have been allowed to come into court, and that it was brought largely for purposes of propaganda, as part of the general campaign against anything and everything that could be labelled, truly or falsely, as "communist." At the time, the powerful interests, financial and industrial, which really control American life and policy were engaged—as they still are—on a tremendous propaganda campaign, which is in reality a campaign for war against the U.S.S.R. To avoid the disastrous industrial slump, they have to develop armaments on a vast scale; to persuade the normally peaceable inhabitants of the U.S.A. to accept a billigerent policy, they have to work up a scare story of alleged Soviet agression; and to buttress their economic and political system against the progressive elements in their country, they have to develop an hysterical campaign of calumny against all left-wing forces, grouped under the label of "Communism." This campaign has, of course, the additional and very special advantage of helping to weaken the Trade Union forces which fight for improved economic conditions and for greater power for the huge industrial working-class.

In such circumstances, the opportunity to launch a charge of "atom-bomb espionage" against two people progressive enough to be labelled as Communists was of the greatest possible propaganda value, for the atom bomb has a special place in American hysteria; at first, it encouraged the illusion that a "Push-button war" was feasible, *i.e.* that the mass of the American people could stay safely at home whilst the hated and feared (and misunderstood) Socialist countries were destroyed by the latest scientific developments, operated by a few hundred airmen and their supporting forces; and later, when it was at first feared and later known that the U.S.S.R. also had atom bombs, and that in any case the best expert opinion regarded the push-button war as impossible and heavy infantry fighting as an inevitable feature of any future war, the hysteria turned to fear.

Such a situation called for scape-goats; and a "frame-up", a false trial of the sort that has only too often poisoned justice in the U.S.A., was something which answered exactly the needs of the propagandists. That the Rosenbergs were Jews, so that a fillip could be given to anti-Semitism, somewhat easily aroused in the U.S.A., and particularly in New York, which has the largest Jewish population of all the cities, in the world, was a helpful "sideline" to the frame-up; and it was adroitly exploited by bringing the case before a Jewish Judge, and having the prosecution conducted by Jewish counsel.

The case, even apart from its more sensational or extreme features, illustrates once more the extreme difficulty of securing a fair trial when prejudices are aroused; indeed, it reminds us that when prejudices are really aroused any objective or reliable thinking on political topics becomes impossible. How can one arrive at a sensible conclusion on any matter if one begins by giving to the protagonists of one side a label—be it Communist or anything else—which in effect says: "Do not believe anything this man says. Do not indeed, examine it, weigh it, test; just assume in advance that it is wrong"?

Let me now tell you something about the case against the Rosenbergs, leaving on one side the other accused.

The Principal witness against them was a man named David Greenglass. Everyone who has studied the case, including the Appellate Courts, agrees that unless his evidence be believed and accepted, the convictions of the Rosembergs could not stand. Who was he? What were his virtues or defects? What had he done in the case?

The answers to these questions are remarkably discouraging for anyone who would like to believe in the integrity and soundness of this trial. In the first place, he was himself admittedly guilty of espionage; he had established this clearly enough by not merely by a series of confessions under examination but also by pleading guilty to the charge to which the

Rosenbergs had pleaded not guilty. At the time he gave evidence, he had not been sentenced; thus, as line by line—he sought in his evidence to convict the Rosembergs of the crime of which he himself was in any case guilty, he might well hope, and he said in terms that he did hope, to get himself a lighter sentence as a reward for what he said. (And, in due course, when the judge came to sentence Greenglass, the lawyer pleading for a light sentence for him argued eloquently that this "approver" ought to be rewarded for betraying his alleged associates, if only because the government would never get anybody to "turn king's evidence" if they did not show such lenience).

We do not have, of course, merely to condemn Greenglass as a mean figure, who betrayed those who, he said, were his accomplices in crime; there is much more than that, from a legal point of view, to be considered when one is weighing the evidence of accomplices (or approvers). In all systems of law derived from England—probably, indeed, in all systems of law generally,—accomplices are treated as highly unreliable, not merely because they are criminals, and in addition betrayers of their friends, but even more because it is dangerously easy for them, for one reason or another, to implicate innocent third parties in their crime by just adding perjury to their other offences. It is easy because, instead of inventing a whole story, they can tell a story which is in all its main features true, and insert in it merely one limited but serious falsity by saying that the other accused was taking part; and this despicable trick is easier than ever when—as we shall see is the case here—the relationship between the approver and the other accused is such that they would naturally, and in fact do, meet from time to time.

There may be many motives for playing this particularly easy trick; sometimes it is due to pay off a grudge—and there was some evidence in the Rosenberg case that this was so—but nearly always there is of course a very powerful motive, namely, the hope of getting a lighter sentence, or a subsequent remission of sentence, or both, in return for helping the government to convict the other accused. This motive is never stronger than when the approver is himself waiting to be, but has not yet actually been, sentenced for the crime; for, each time he is asked a critical question in examination or cross-examination, he must have it clearly before him that his chances of a light sentence will increase in exact proportion as he makes the case worse for the other accused. (In England, when accomplices are to be called as witnesses, they are given a pardon before they give evidence, so that at any rate it may not be said that they have a direct and powerful incentive to "pile it on"). Greenglass had thus every conceivable demerit from the point of view of temptation to lie for "good consideration"; he had indeed an extra motive in that his wife, whom he profesed to love dearly, was named in the indictment as one of the conspirators, but not actually indicted. Greenglass, who had emphasised his own ignobility by naming her as one of the conspirators in the very first of his many interviews with the "FBI" (The Federal Bureau of Investigation), might well have had solid grounds for hoping that, by helping the government, he would help not only himself but also the wife whom he had betrayed; and certainly she has been left unscathed until today, although as it turned out, he received a heavy sentence and has not yet been released.

Practically every system of law, recognising the very poor quality of accomplice evidence, demands some form or degree of corroboration of their evidence. Of Greenglass' evidence in this case, there was no corroboration except from his wife, who was equally an accomplice; and in my view as a lawyer, it runs counter to all normal standards of criminal procedure and of the administration of justice, to base on such evidence, in the absence of independent corroboration, not merely a conviction but a death sentence.

The defects of Greenglass as a witness on whom it would be safe to rely do not end with the above statements; the utter rottenness of the man's character is further demonstrated by the fact that Ethel Rosenberg, whom he was pushing towards the electric chair, was his own elder sister, who had always helped and befriended him. Julius Rosemberg, whom he was treating in the same way, was of course his brother-in-law, and the father of Ethel's two children.

The tainted evidence of Greenglass and his wife was, in substance, the whole of the

evidence against the Rosenbergs. What little else there was was trivial, and what small fragment of it could have been thought to be more than trivial came from a witness who was, like Greenglass, in the conspiracy, and thus an approver. This witness admitted in the witness-box that he had told lies under oath, that he had been "scared to death" and so had told the F.B.I. "everything he knew," in the hope that he might "come out the best way," and that "nothing would happen to him." (In this he was fortunate; he was not even named in the indictment).

In answer to that weak case, both the Rosenbergs gave clear and emphatic evidence denying the story against them; and cross-examination in no way weakened them. There were one or two instances, such as a story about a console table alleged to have been given to them by the Russians, where they gave explanations at which it was easy for the prosecution, in the absence of corroboration, to poke scorn; but subsequent investigation, long after the trial established independent facts which corroborated the story.

When the evidence was finished, the jury had to arrive at their verdict in the general hysterical atmosphere of the day, additionally polluted for them by the constant efforts of the prosecution lawyers throughout the trial to drag in the alleged Communist connexions of the Rosembergs. That, together with the constant mention of the "the Russians", probably sufficed to make a fair consideration by the jury virtually impossible, a fact which illustrates the difficulties which always surround political trials.

The jury duly returned verdicts of guilty on this weak evidence, and the judge, a day or two later, sentenced the Rosembergs to death. As is customary in the U.S.A., he gave "reasons" for doing so; and his "reasons" form one of the worst features of the case.

In the course of his reasons, he delivered a lecture on "Russian terrorism". He was of course abysmally ignorant of any facts relating to the Soviet Union; if there be any Russian Terrorism, there was not any evidence of it in the case; and if an attempt had been made to introduce any such evidence, it would have been wholly immaterial, and should have been excluded as such. He made similar comments on the administration of justice in the U.S.S.R.; this, too, was a sealed book to him, and equally immaterial; he would have been better employed in trying to keep clean the administration of justice in the U.S.A. All one can really gain from this part of his reasons is a still clearer picture than before of the extent to which anti-Soviet hysteria has invaded nearly all circles in America.

When he spoke of things that were really relevant to the question of what sentence ought to be passed on the Rosembergs (on the assumption that they were guilty) he behaved just as badly. Although attempts by the prosecution to prove in evidence that the information obtained by Greenglass and allegedly passed on from him through the Rosenbergs to the U.S.S.R. was of real importance had broken down, so that there was no evidence of its value, the judge treated it as tremendously important. He said that it was just the vital information that enabled the U.S.S.R. to develop the atom bomb, and that that country could not have developed the bomb without the information! This assertion, which has been ridiculed by many scientists ever since, seemed to form a large part of the judge's reasons for passing sentence of death; there was no more evidence—reliable or even unreliable—to support it than there would be for the proposition that President Eisenhower built the Taj Mahal. By the side of this, the judge's statement that the conduct of the Rosembergs "has already caused, in my opinion, the communist aggression in Korea"—marching ill with the recent admission by one of the agents of Li Sing Man (Segngman Rhee), speaking over the television system in America, that the Korean war was in fact started by South Korea—seems almost more silly than fatal. His further observation that the Rosenbergs had "altered the history of the world" to the injury of the U.S.A. is equally silly and equally objectionable, especially when one recalls that there was not even an allegation in the indictment of any intent to injure the U.S.A.

A sentence passed on the basis of such reasons commands, in my view, even less confidence than a verdict based on the evidence I have discussed.

And there, so far as first instance was concerned, rests this terrible injustice.

There were, of course, appeals. The American Federal procedure admits of a large number of appeals, and admits too of the various instances of appeal being approached again and again with motions for re-hearing and other methods of arguing one's points once again. But, unfortunately, none of the appellate procedure available in this case admitted of any reconsideration of the facts or the evidence, nor even of the sentence. Thus, nothing was argued through the two and a half years but points of law, some of them substantial enough but none of them successful. And so, in the end, the Rosembergs died—I would rather say, on my conscience as a man and a lawyer, the Rosenbergs were murdered.

* * *

The lesson of the case is, I think, clear. It is always difficult to try political cases justly; it is difficult to decide anything justly when the whole of the public mind has been poisoned by false stories. And, therefore, it is the duty of all of us, especially of lawyers, to keep our minds clean, to keep as free as possible from prejudice, to weigh facts and assertions soberly and carefully, to make sure where right and justice lie, and then to fight in their defence.

OBITUARY

Mr. EMANUEL H. BLOCH, the Counsel in the Rosenbergs' case could not contribute any article in this issue as he informed us in writing that he would be engaged in touring through the United States to collect funds for the support and maintenance of the Rosenbergs' Children—Michael and Robert. He however, sent his goodwishes and promised to contribute an article in a future issue.

When our magazine was already in the press, we heard with profound regret the sad news of his sudden death. In this column we pay our respects to the departed soul and offer our condolence to the bereaved family.

RELIANCE ON GRATUITOUS PROMISES

PROFESSOR ROSCOE POUND, A.M., PH.D., LH.B., J.U.D.

(Article specially contributed to the University Law College Magazine)

The author of this thoughtful article, Dr. Roscoe Pound, Emeritus Professor of the Harvard University, U.S.A., delivered lectures in 1953 as Tagore Professor of Law for 1948 on "The Ideal Element in Law". Incidentally it may be mentioned that he made a gift of the copyright of his lectures the proceeds of which are to be utilised for the University Law College on account of a new building or its library. We take this opportunity to convey him our heartfelt gratitude.—[Editor]

What we took to be the law on this subject in the nineteeth century is brought out well in the leading American case of *Throne* v. *Deas*[1] decided in 1809, in which the opinion of the court was delivered by Chief Justice, later Chancellor, Kent, one of the greatest names in American judicial history. The case was this: A ship was about to sail from New York to a southern port. One of the three owners who sailed with the ship, before sailing asked defendant, also an owner, to have the ship insured. The latter told him not to be uneasy as to that because it should be done. Later another of the owners, a co-plaintiff, learning that the ship had not been insured, told the defendant that if the latter did not immediately procure the insurance the co-plaintiff would do it himself. The defendant replied that "he would that day apply to the insurance offices and have it done." He did nothing, however, and the ship was wrecked uninsured. The two owners to whom the promises had been made brought "an action on the case for nonfearance." Recovery was denied. Chief Justice Kent said that "by the common law a mandatary, or one who undertakes to an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it and does it amiss." In those days the law of New York was still formative and much reliance was put upon the Roman law. Kent, who was a learned civilian, admitted that the Roman-law rule, which held the mandatary to his gratuitous promise, was more equitable and was to be preferred since the promisee relying upon the good faith of the mandatary "was thereby prevented from doing the act himself or employing another to do it."[2] Such was undoubtedly the common-law rule as to a mandate at that time. Lord Holt in organizing the law of bailments at common law in the leading case of Coggs v. Bernard,[3] treated mandate, which in Roman law was consensual, as a real contract, requiring delivery of a *res* to make it effective. This was followed in Sir William Jones' Essay on Bailment and Judge Story's treatise on Bailment and became settled law.

How did a rule so out of line with accepted propositions of morals and ideas of justice come to be so firmly established? To answer this question we must look into the basis of legal obligation.

As a general proposition may we not say that the legal order seeks to secure the reasonable expectations involved in life in civilized society? But recognition of what these expectations are has been a gradual process in the development of civilization and hence in the development of law. First to be recognized and secured were expectations having to do with peace and order, calling for securing of the simpler forms of the social interest in the general security. Thus we find in the very beginnings of law a postulate that in civilized society men must be able to

---

[1] 4 Johnson (N.Y.) 84.

[2] Ibid. 97.

[3] 2 Ld. Raym. 909 (1703).

assume that others will commit no intentional aggressions upon them. But the corollary that now completes the proposition, namely, that one who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) assert a privilege because of a countervailing individual interest of his own which there is a social or public interest in securing, was not generally accepted till the present century. A further postulate that in civilized society men must be able to assume that others will act reasonably and prudently so as not, by want of due care under the circumstances, to impose upon them an unreasonable risk of injury got recognition in the classical Roman law but in the common law had its real development in the nineteenth century. A further proposition that one may be held liable for unintended, non-negligent interference with the person or property of another through failure to restrain or prevent the escape or getting out of bounds of some thing or agency which one maintains or employs such thing or agency having a tendency to get out of bounds and do harm, began to be argued in the last third of the nineteenth century, was hotly debated in the first two decades of the present century and has only had general recognition in the present generation.[4]

With economic development the law begins to recognize and give effect to expectations involved in economic relations—in the relations upon which the economic order depends. Thus there comes to be increasing recognition of a postulate that in civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence (1) will make good reasonable expectations which their promises or other conduct reasonably create, and (2) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto.

With the general security and the security of economic relations provided for, the humanitarian thought of today, the mode of thought of the welfare or service state, is developing recognition of expectations of a full moral and social individual life. We see this in workmen's compensation, in theories of shifting liability to those who may pass the losses of each of us to all of us or at least to enterprises and activities of which they are normal incidents or even to those better able to bear them. It is behind plans for social security and takes ideal forms in universal declarations of rights for a universal organization of mankind in which men are to be relieved of want and fear and to be guaranteed just terms of leisure. Today we are thinking mostly of the third stage before complete development of our law to the exigencies of the second stage has become complete.

The oldest and most general idea in the development of contract is not one of enforcing promises. It is one of enforcing security for performance. Thus hostage and pledge are the ideas from which we must begin the history of contract. From the start there is a sharp distinction between the promise or agreement of itself and the transaction which creates legal liability. Gradual modificotions, additions and coming in of new ideas, put more and more stress upon the former. But a necessity of the other governs in Roman law to the end, presists long in the civil law, and hangs on in the common law of today.

In the classical era of Roman law the everyday contract is the formal *stipulatio*—question and answer in the very words of the question using the formal verb *spondere* suggesting a promise in that form backed by pre-legal religious sanctions.[5] This was available only to Roman citizens but by the *ius gentium* equivalent words could be used if the form was kept.[6] Another formal contract was the literal (*expensilatio*) likewise a transaction of the strict law made by entries in the domestic books of account of Roman citizens.[7] There came to be added a category of what were called real contracts, in which obligation was created by delivery of possession of something by the one party to the other. Here originally there was a transfer of the legal title with an

4As to these jural postulates of civilization see Pound, Social Control Through Law, 112-118.

5Mitteis, Ueber die Herkunft der Stipulation, in Festschrift für Bekker, 107-142 (1907).

6Gaius, iii, § 93.

7Ibid. §§ 128-133.

agreement of good faith for reconveyance when the purpose was achieved.[8] The oldest was loan for consumption, the only real contract of the strict law.[9] But about the middle of the second century B. C., as a result of economic progress, the *bonae fidei iudicia* provided for real contracts of deposit for safe keeping, loan for use, and pawn. They provided also for a category of consensual contracts: Sale, letting and hiring, mandate, and partnership, which required neither form nor delivery of a *res* but were contracted solely by consent of the parties. These were not fully developed until under the empire.[10] However, recognition of those consensual contracts did not mean that *consensus ad idem* alone and of itself could make a legally enforceable contract. The doctrine that no action arose from a bare agreement remained in force. Later further additions were made: The innominate contract, an exchange of promises where one party performed and thus clothed the pact and made of it a contract,[11] actionable pacts, praetorian, in which the praetor gave actions *in factum*,[12] accessory, that is, incidental to a transaction in a recognized category of contracts,[13] and statutory, introduced by legislation of the later empire for certain special kinds of agreement.[14] Also the formality of the stipulation came to be greatly relaxed and writings reciting that the form had been gone through with took its place. Justinian enacted that the presumption created by such writings could only be overcome by proof that one party or the other had been absent from the city at which the writing was dated during the whole of the day which it recited.[15] This all but made the writing surffice. Thus after one thousand years of development from the Twelve Tables to Justinian there was little left in Roman law of the doctrine of unenforceability of bare agreements.

In the later Middle Ages the civil law and the canon law were not in agreement, the one denying legal validity to certain mere pacts not otherwise objectionable[16] while the other held that it was the duty of a Christian to keep his promise without regard to its form.[17] But the influence of the church law and of the writers on the law of nature resulted in practical disappearance of the category of unenforceable promises and agreements, not otherwise objectionable, even where it was maintained in theory, and there has been a complete abandonment of it in recent codification throughout the civil-law world. An idea of *causa*, a reason for legally enforcing pacts, taken from Roman law, was given currency by Domat.[18] But Domat held and Pothier, who said that the idea of cause for enforcing was far from being in accord with nature or reason,[19] agreed that in a gratuitous promise the intention of benefitting the promisee was sufficient cause. The French Civil Code (1804) took up the term *causa* from Pothier and this was followed in Continental Codes based upon it. It has led to much discussion.[20] In the Roman-Dutch law of South Africa, under English influence, there was for a time an attempt to treat *causa* as the "consideration" called for by the common law.

---

[8]Gaius, ii, § 60.

[9]Buckland, Text Book of Roman Law (2 ed. 1932) 463.

[10]Ibid. 467.

[11]Digest, xix, 5, 5 pr.

[12]Buckland, Text Book of Roman Law (2 ed. 1932) 529.

[13]Viard, Les pactes adjoints en droit classique (1928).

[14]Buckland, op. cit. 530-533.

[15]Institutes, iii, 19, 12.

[16]Andreas ab Exea (16th century jurist) De pactis, 294, 296, in 6 Tractatus Universi Juris. pt. 2, fol. 9; Caccialupi (jurist, died 1496) De pactis, xi, 7, 6, in 6 Tractatus, pt. 1, fol. 13; Duarenus (French jurist, 1509-1559) De pactis, vi, 1, in 6 Tractatus, pt. 1, fol. 15.

[17]Antonius Corsetus Siculus (15th century canonist) De iuramenti et eius priviligiis, no. 70, in 4 Tractatus, fol. 364; Gulielmus Redoanus (16th century Bishop of Nebio in Corsica) De simonia mentali, ii, 4, 15, in 15 Tractatus, pt. 2, fol. 60, no. 15.

[18]Les lois civiles dans leur ordre naturel (1635) i, 1, § 1, nos. 5, 6.

[19]Traité des obligations (1761) i, 1, 1, § 1.

[20]See Planiol, Traité élémentaire de droit civil (11 ed. 1930) nos. 1026-1046; Capitant, De la cause des obligations (3 ed. 1927).

But that law now, as originally, requires neither form nor consideration.[21] Scotland received the civil law from the Dutch Universities, so that nothing in the way of consideration is required by Scots law.[22] As Planiol says, the requirement and the idea are useless.[23] The most recent codes give them up entirely.[24]

In the common law we may see a like gradual extension of the sphere of enforceable promises and agreements very much as happened in Roman law.

Contracts at common law, looked at analytically, are formal, real, or simple, according to whether the source of obligation is in the form of the transaction, in the delivery of something from one party to the other, or in the agreement of the parties. The common-law actions upon contract are debt, covenant, account, and assumpsit. Debt is the oldest. A writ of debt is to be found in Glanvill at the end of the twelfth century.[25] It has the same form as a writ of right brought to recover land and is in the form of recovery of property detained rather than of a sum of money owed. Indeed, if one owed another a horse by reason of a sale or exchange, debt could be brought for the horse, although if the defendant had borrowed the horse and had not returned it, the action was detinue;[26] a later development out of debt by a slight change in the words of the writ.[27] As trial in an action of debt was by compurgation, except where the debt was established by an instrument under the debtor's seal, the action came to be used only for such cases. Another writ of the same general type was account, known from 1232 but probably older.[28] It enforced a duty owing by a bailiff, who had collected the profits, to render a reasonable account to the lord of the manor. Partly by fiction and partly by extension by analogy, it was made to cover cases where one was bound to account to another for something which had been delivered to him or which he took or held as partner or agent.[29] The writ of covenant appears at the end of the twelfth or beginning of the thirteenth century.[30] It was a still further departure from the idea of demanding recovery of one's property in a writ of the same form as debt. But in the fourteenth century it became settled that a covenant must be under seal.[31] Instead of the word "render" it commanded the defendant that "justly and without delay he perform the covenant." Thus the common law began with two formal contracts: The written acknowledgment of indebtedness in a fixed sum, made under seal, and the written promise of some performance, likewise made under seal. A third formal contract of the common law is the recognizance, a solemn oral acknowledgment of indebtedness made in open court and put in the record.[32] To these older formal contracts there were added later what Ames aptly termed mercantile specialities, *i.e.*, bills of exchange and promissory notes, taken over from the law merchant.[33]

There was also at common law an old category of "warranties," that is, promissory representations incidental to other transactions. Actions were brought upon them on a theory that a breach was a wrong. But they came to be thought of analytically from the standpoint of contract and may be sued on either

---

[21]Lee, Introduction to Roman-Dutch Law (3 ed. 1931) 230-233, 427-434.

[22]Gloag and Henderson, Introduction to the Law of Scotland (3 ed. 1939) 37.

[23]2 Planiol, Traité élé mentaire de droit civil (11 ed. 1930) nos. 1037, 1039. See also Amos and Walton, Introduction to French law (1935) 1634.

[24]Schuster, Principles of German Civil Law (1907) § 140, Swisss Code of Obligations § 15; 2 Planiol, Traité élémentaire de droit civil (11 ed. 1930) no. 1047.

[25]Bk. x, cc. 1-14.

[26]Fitzherbert, New Natura Brevium (8 ed. 1755) 273, 357.

[27]Ibid. 323, 357.

[28]2 Maitland, Bracton's Note Book (1887) pl. 859, p. 668.

[29]Ames, Lectures on Legal History (1913) 116.

[30]Baildon, Select Civil Pleas, 1200-1225, Selden Society Publication for 1890, pl. 89.

[31]2 Pollock and Maitland, History of English Law (2 ed. 1898) 219.

[32]It is known from 1201, 2 Pollock and Maitland, History of English Law (2 ed. 1898) 203-204.

[33]2 Ames, Cases on Bills and Notes (1881) 872 878.

ex delicto or ex contractu,[34] something which even now makes trouble in connection with statutes of limitations.[35]

But the significant development of the law of contracts followed the enforcement of simple contracts, that is, agreements not in the form of specialty or bailment, by an action of assumpsit, in form *ex delicto*, for the wrong in not performing a promise exchanged for an act or for another promise. [36] Thus there came to be a great extension of the area of legally enforceable promises and agreements. But as this extension was made by development of an action on the case, upon a theory of a tort, the exigencies of an action *ex delicto*, made to afford a remedy *ex contractu*, imposed on the common law of contracts the doctrine of consideration.

Lord Mansfield, Lord Chief Justice of the King's Bench, 1756-1784, sought to establish and came very near establishing that no promise in writing and no business promise should be *nudum pactum* for want of consideration. [37] This was in line with the eighteenth-century law of nature thinking and the civil law of the time with which he was familiar. But a reaction set in after his time and it was not until the present century that a new tendency to extend the sphere of legally enforceable promises showed itself in common-law jurisdictions. Such a tendency is manifestly going on today through growth of exceptions to the requirement of consideration, through stretchings of the idea of consideration, and through strained interpretations of transactions so as to bring them within recognized categories.

Ames spoke rightly of the "mystery of consideration." Its nature, its definition, the reason for it, and its history have been and still are subjects of much dispute. The latest American work on contracts[38] substantially gives it up, holding that there is no general idea but there are a great many rules for particular states of fact. Certainly, as things are today, the term does not have one settled meaning in the law of simple contracts. Nor does it have the same meaning in the law of contracts, in the law which grew up in connection with the statute of uses,[39] in the law of negotiable instruments,[40] and in equity.[41] In the nineteenth century it was thought to have become settled that the common-law theory of enforcing simple contracts was one of giving effect to bargains. A simple contract was either an exchange of promises or an exchange of a promise for an act. In a bilateral contract each promise was the consideration for the other. In a unilateral contract the act was the consideration of the promisor. But not every promise nor every act would be consideration. In the reign of analytical historical juristic thinking it became the orthodox theory that detriment to the promisee was the significant feature of consideration. It met the demands of historical derivation from an action of trespass on the case and the course of decision in the nineteenth century for the most part could be fitted to it. The promise exchanged for the promisor's promise must be something the promisee was not bound to do and so a detriment to him. The act exchanged for a promise must be one the promisee was not already bound to do. Moreover it had to be something done in exchange for the promise when made, not something done in the past and so not done as part of a bargain. Under the influence of the equivalent theory, benefit to the promisor, which was historically behind the

---

[34] Ames, Lectures on Legal History (1913) 226 ff.

[35] Blessington v. McCrory Stores Corp., 305 New York, 140 (1953).

[36] Ames, Lectures on Legal History (1913) 129-165; id. The History of Assumpsit (1888) 2 Harvard Law Rev. 1, 53.

[37] Pillans v. Van Mierop, 3 Burr. 1663, overruled in the House of Lords in Rann v. Hughes, 7 T. R. 350, n.

[38] 1 Corbin, Contracts, §§ 193-209, particularly §§ 206 and 257 on p. 857.

[39] "Good consideration", "natural love and affection." Here desire to perpetuate a family was held a good reason for raising a use. Sharington v. Strotton, 1 Plowd. 287 (1565).

[40] 2 Ames, Cases on Bills and Notes (1881) 878-878; American Negotiable Instruments Law § 25.

[41] Pound, Consideration in Equity, Wigmore Celebration Legal Essays (1919) 13 Illinois Law Rev. 667.

action of *indebitatus assumpsit*, was often urged as an alternative, and as a left over from the natural-law thinking of the eighteenth century there were cases which went on a doctrine of moral consideration.[42] But these analytical anomalies were rejected or explained away. In England this theory of a simple contract has been adhered to consistently in refusing to recognize consideration moving from a third person[43] or promises for the benefit of a third person[44]. Williston says, truly, that English law at this point "at least has the merit of definiteness."[45] In the United States dissatisfaction with the practical result of the orthodox theory led to recognition of the idea of benefit to the promisor as one form of consideration with the result that consideration moving from a third party could be recognized and a settled course of decision upholding contracts for the benefit of a third person could be brought into line with the theory.[46] This has proved to be only part of a progressive relaxation of the requirement of consideration.

None of the theories of consideration will explain the actual course of decision in common-law jurisdictions today[47]. Indeed the Restatement by the American Law Institute recognizes a catch-all category of "informal contracts without assent of consideration."[48] The condition of the law as to simple contracts is made especially serious by the tendency to reduce all contracts to that one category. The informality of pioneer America led to a progressive deterioration of the seal as a symbol of deliberate acknowledgment. One was estopped to deny what he had formally recited under seal. But it came to be regarded as the merest form. An impression on paper,[49] a wafer without impression,[50] a scroll made with pen and ink,[51] the word "seal" written or printed,[52] the letters "L.S.,"[53] or a mere dash following the signature,[54] were held enough. Although a few states were somewhat stricter, no less than twenty adopted most or all of these informal equivalents[55] Moreover, twenty-seven states have done away with the distinction between sealed and unsealed written contracts.[56] In six others a seal does no more than raise a presumption of consideration,[57] but this presumption has now been done away with in New York.[58] An unfortunate condition of the law in a great part of the country has resulted in that there is no way of making a legally binding promise otherwise than as part of or in the form of a bargain. The Uniform Written Obligations Act, recommended by the National Conference of Uniform State Laws as a remedy has been

---

42This analytical historical theory of consideration is discussed thoroughly in Langdell, Selection of Cases on the Law of Contracts (2 ed. 1879) Summary, §§ 45-98, published separately as Summary of the Law of Contracts (1880); Leake, Elementary Digest of the Law of Contracts (1878) 605-631.

43Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. [1915] A.C. 847.

44Ibid. See also Cleaver v. Mutual Reserve Fund Life Assn. [1892] 1 Q.B. 147, 152.

45 2 Williston, Contracts (2 ed. 1936) § 360.

46 1 Williston, Contracts (2 ed. 1936) §§ 102, 114; American Law Institute, Restatement of Contracts (1932) § 75.

47The theories are exhaustively discussed in 1 Williston, Contracts (2 ed. 1936) §§ 100-103G. and by Judge Pawate in a very interesting book, Contract and the Freedom of the Debtor in the Common Law (1953) chap. 4.

48Restatement of Contracts (1932) §§ 85-94.

49Beardsley v. Knight, 4 Vt. 171, 179 (1832). English courts have been willing to go that far. In re Sandilands, L.R. 6 C.P. 411 (1871).

50Tasker v. Bartlett, 5 Cush. 359, 364 (Mass. 1850). Massachusetts has now by statute made a recital that the instrument is sealed sufficient. Mass. Acts, 1929, c. 377, § 2.

51"From the earliest period of our judicial history a scrawl has been considered as a seal." Trasher v. Everhart, 3 Gill & J., 234 246 (Maryland,

52Jeffery v. Underwood, 1 Ark. 108 (1838).

53I.e., **loco sigilli**, "in place of a seal," Jacksonville M.P. R. & N. Co. v. Hooper, 160 U.S. 514, 518-519 (1896).

54Hacker's Appeal, 121 Pa. 192, 202-205 (1888).

551 Williston, Contracts (2 ed. 1936) § 202.

56Ibid. § 218.

57Ibid.

58Civil Practice Act of 1920 as amended in 1935.

adopted in two states only.[59] At the same time, contrary to what seems to have been the original rule, the mercantile specialties, as between the original parties, have been made to require consideration,[60] bail bonds have largely replaced recognizance,[61] and courts of equity, where a promise under seal is enforceable at law without consideration, have refused specific performance of a "voluntary" promise.[62] In practical effect, in more than half of the United States all contracts have been reduced to the simple contract requiring consideration.

English courts have had to strain the law of trusts and work out implied assignments in order to avoid hard results from refusal to recognize contracts for the benefit of third persons as creating rights in the latter.[63] In like manner American courts have been and are increasingly straining to get away from the exclusive bargain theory and the requirement of consideration.

In the United States there are now at least fifteen recognized exceptions which may be grouped under four heads.

A first head is what is called promissory estoppel. Here there is no true estoppel. There is action afterward on a gratuitous promise which was not part of a bargain when made. These are not cases of making good an appreance of anything. They are cases of intent to make a gratuitous promise. There are two types. One is subscription promises. It used to be said the promise of each was consideration for the promise of the others.[64] But obviously there is no exchange of promises among the subscribers. More recently these subscrptions have been held enforceable after the promise has begun to act on them, either under a sort of theory of estoppel or by treating the promise of the subscriber as a sort of offer, accepted when the promisee begins to act.[65]. In Pennsylvania it has been said that acceptance of the subscription by a church or charitable institution is consideration.[66] Here in order to avoid the requirement of consideration the promise is turned into an offer toward an exchange of promises. So far as these cases go on any theory other than the keeping of promises, they may be referred to the injurious reliance theory. The other type is gratuitous promises of single individuals afterwards acted on.[67] They purport to go on the injurious reliance theory of consideration but, as there was no exchange of the promise for the subsequent action, they are not consistent with the bargain theory of contract. The case of gratuitous promises to procure insurance, stated at the outset, is of this type and it will have to be considered more fully later.

A second head is "moral consideration," that is, treating a reason in morals for making a promise as a reason for legal enforcement of it. No less than five types of cases belong here. They will be numbered consecutively after the first two stated, putting them as exceptions to the bargain-consideration idea.

A third exception is to be seen in promises made in recognition of moral obligation arising

---

[59] Reeve, The Uniform Written Obligations Act

[60] 2 Ames, Cases on Bills and Notes (1881) 876-878.

[61] 1 Williston, Cantracts (2 ed. 1936) § 220.

[62] That is, one not part of a bargain. Jeffreys v. Jeffreys, Cr. & Ph. 138 (1841) contrary to older cases in chancery and followed in the United States where the sealed instrument recited a consideration but there was none in fact. Lamprey v. Lamprey, 29 Minn. 152 (1882); Graybill v. Brugh, 89 Va. 895 (1893).

[63] Moore v. Darton, 4 DeG. & Sm. 517 (1851); Caven v. Canadian P.R. [1925] 2 Dom. L. R. 845 (P.C.).

[64] Allen v. Duffie, 43 Mich. 1, 4 (1880).

[65] Young Men's Christian Assn. v. Estill, 140 Ga. 291 (1913); Brokaw v. McElroy, 162 Ia. 288 (1913); Cottage St. Church v. Kendall, 121 Mass. 528 (1877); Keuka College v. Ray, 167 N.Y. 96 (1901); Irwin v. Lombard University, 56 Ohio St. 9 (1897); U. of Pa. Trustees v. Coxe's Executors, 277 Pa. 512 (1923). The English courts refuse to enforce such promises. In re Hudson, 54 L.J. Ch. (N.S.) 811 (1885). So also in Canada. Dalhousie College v. Boutelier [1934] Can. Sup. Ct. 642.

[66] Board of Foreign Missions v. Smith, 209 Pa. 361 (1904).

[67] Switzer v. Gertenbach, 122 Ill. App. 26 (1905); Ricketts v. Scothorn, 57 Neb. 51 (1898).

from receipt of some material benefit without any original legal liability. Here although there is no bargain, no injurious reliance, and no antecedent legal liability which has become unenforceable, there is often held to be a contract.[68]

Fourth may be put new promises where a debt is barred by limitation or discharge in bankruptcy or the like.[69] These cases have sometimes been explained by referring them to waiver—the intentional relinquishment of a known right. Waiver might be referred to estoppel or to contract.[70] But it seems more and more to be treated as a legal transaction in which the courts give the intended effect to the will of the one who acts, requiring neither the elements of estoppel nor consideration.[71]

Fifth are the cases of defective execution of an intention to secure a creditor, settle property on a wife, or provide for a child. These are reformed in equity in a way that amounts to specific performance.[72] There is even some authority for treating cases of this sort as enforceable directly in equity.[73]

Sixth may be put the case of a defectively executed conveyance made to recognize a moral obligation, which will be reformed so as to amount to specific performance on the theory that because of the prior benefit received by the grantor it is not specific enforcement of a "voluntary" promise.[74]

Seventh and last under the second head, may be put a promise by a parent to a child that the child shall have his earnings free of the parent's claim. "It is in effect a promise to give up a right, which is binding if acted upon." No consideration and no seal is required.[75]

A third head embraces what in Roman law are called *pacta donationis*, promises of a gift. It includes two more exceptions to the theory of bargain and consideration.

Eighth is a well known group of cases in which courts of equity torture gifts into contracts so as to enforce *pacta donationis* although the rule is supposed to be that equity will not aid one whose claim does not have a foundation in a common law consideration.[76]

Ninth must be put gratuitous declarations of trust.[77] An oral gratuitous declaration of trust as to a chattel is binding. The result is significant. If I say "I give you this watch" but do not deliver it there is no gift. If I say "I will give you this watch at noon tomorrow," without more, the promise will have no legal effect. But if I say, "I hold this watch in trust for you," and continue in possession but clearly indicating it as the trust *res*, I can be made to deliver it as held in a dry trust.

---

[68]Holland v. Martinson, 129 Kan. 43 (1915); Muir v. Kane, 55 Wash. 131 (1909).

[69]Restatement of Contracts, §§ 86, 87.

[70]Ewart, Waiver Distributed Among the Departments Election, Estoppel, Contract, Release (1917) chap. 1.

[71]That element of estoppel not necessary, Kiernan v. Dutchess County Mut. Ins. Co., 150 N.Y. 190, 195 (1896); G. S. Johnson Co. v. Nevada Packard Mines Co., 272 Fed. 291, 305 (1920); Hayes v. Monning, 263 Mo. 1, 45-46 (1914). That the consideration required to support a simple contract is not necessary. G. S. Johnson v. Nevada Packard Mines Co., supra; Pabst Brewing Co., v Milwaukee, 126 Wis. 110, 114-116 (1905). Compare a promise to perform a promise obtained by fraud. Restatement of Contracts, § 89. This seems to establish waiver as a legal transaction requiring no consideration. There is not even "moral consideration" in such a case.

[72]See Pound, Consideration in Equity, Wigmore Celebration Essays, 435, 443-444 (1919) and cases there cited.

[73]See 2 Story, Equity Jurisprudence (13 ed. by Bigelow, 1886) § 753b, 120, n. 1.

[74]Legate v. Legate, 249 Ill. 359, 364-365 (1911).

[75]See Warren, Husband's Right to Wife's Services (1925) 38 Harv. Law Rev. 421, 425.

[76]Ungley v. Ungley, 5 Ch. D. 887 (1877); Ferry v. Stephens, 66 N.J. 321 (1876); Freeman v. Freeman, 43 N.Y. 34 (1870). See also the torturing of a gift into a contract in order to make it enforceable at law. Allegheny College v. National Chautauqua Country Bank, 246 N.Y. 369 (1927). Here the dissenting opinion shows what the court actually does. See Pound, Consideration in Equity, Wigmore Celebration Essays (1919) 435, 439-440.

[77]Ex parte Pye, 18 Ves. 140 (1811). American cases in accord may be found in 1 Scott, Trusts (1939) § 28, p. 177, n. 4.

Finally under a fourth head, intention to be bound in a business transaction, we may put six and perhaps seven exceptions with good authority behind them.

Tenth is the case of option under seal without consideration. Here, although courts of equity are accustomed to say they will not aid a volunteer and will not grant specific performance of a contract under seal where there is no common law consideration, yet they in effect grant specific performance of a collateral contract under seal to keep the offer open for the time specified or else treat the option as a unilateral contract under seal on condition of exercise of the option within the time fixed. In either event they grant specific performance of a contract under seal although without consideration.[78]

Eleventh we may note waiver of claim or defence where there is no moral duty involved. There are many cases of this sort where a promise as a business transaction is upheld without consideration. Examples are: Waiver of a claim,[79] waiver by a surety of his defence of release by extension of time to the principal,[80] consent to a breach of trust[81], even after breach,[82] waiver of breach of condition by promise to perform notwithstanding,[83] promise to perform all or part of a contract procured by fraud or otherwise voidable, where not avoided before the new promise.[84]

Twelfth, in some states, release by mere acknowledgment of performance will operate without seal or consideration.[85] At common law release was thought of as in the nature of a conveyance and so was required to be by deed under seal. Equity would enforce specifically a covenant not to sue and that came to be an equitable defence at law and to operate as a discharge without resort to equity. Thus it came to be that release called for seal or consideration. But the same idea which led to making waiver an independent legal transaction led the courts in some jurisdictions to give effect to release by mere acknowledgment of satisfaction without consideration.

Thirteenth, stipulations, agreements of parties or their attorneys or counsel with respect to conduct of and proceedings in litigation require neither seal nor consideration.[86]

Fourteenth, the present generation has seen the recognition in American courts of a doctrine of mandate with no *res*. In Roman law, mandate (a commission to do something for another gratuitously) was a consensual contract. As the common law had no category of consensual contracts, we could only recognize a bailment of mandate, an undertaking to do something for another gratuitously with respect to some chattel delivered by the one to the other.[87] If without any bailment one promises to do something for another gratuitously and, having begun to carry out his undertaking, performs it negligently or negligently leaves it off incomplete, he is liable in an action on the case.[88] But suppose he forgets and neglects to do anything? Here it has been taken that the action would have to be *ex contractu*. Notwithstanding the want of consideration, a number of courts recently have allowed the action.[89] There is no bargain here, and no act in reliance.

A fifteenth exception may be seen in letters of credit not under seal and not upon consideration, which are given effect when acted on. Sometimes this is done on a theory of

---

[78]See McGovney, Irrevocable Offers (1914) 27 Harvard Law Rev. 644, 646-647, and cases cited on 646, n. 5.

[79]McCue v. Silcour, 122 N.J. Law, 12 (1939).

[80]Bank at Decatur v. Johnson, 9 Ala. 622 (1846); Porter v. Hodenpuyl, 9 Mich. 11 (1860); Fowler v. Brooks, 13 N.H. 240, 245 (1842); Bramble v. Ward, 40 Ohio St 267, 269 (1883).

[81]Lannin v. Buckley, 256 Mass. 78, 82 (1926).

[82]Preble v. Greenleaf, 180 Mass. 79, 82-83 (1901).

[83]Restatement of Contracts, § 88.

[84]Ibld. § 89.

[85]Green v. Langdon, 28 Mich. 221 (1873); Gray v. Barton, 55 N.Y. 68 (1873); Carpenter v. Soule, 88 N.Y. 251 (1882).

[86]Restatement of Contracts, § 94.

[87]Story, Commentaries on the Law of Bailments (1832) § 137.

[88]Wilson v. Brett, 11 Meeson & Welsby, 113 (1843); Hammond v. Hussey, 51 N.H. 40 (1871).

[89]Maddock v. Riggs, 106 Kan. 808 (1920); Kirby v. Brown, 229 App. Div. 155 (N.Y. 1930); W.B. Saunders Cl. v. Galbraith, 40 Ohio App. 155 (1931).

estoppel,[90] and sometimes on a theory of an independent transaction of the law merchant[91] requiring no consideration except between the immediate parties.[92] At any rate, it has been well said: "Throughout the cases we may note the courts feeling, more or less subconsciously, that we have here a substantive institution of the law merchant, which ought to be sustained on its own basis; and that whatever common-law theories may be convenient for the purpose are to be resorted to in order to fortify it. It is significant that no deliberate written promise of a business man or commercial entity, made as a business transaction, to answer for credit extended on the basis of the writing has failed of enforcement in our courts."[93]

It is quite possible that we should add another exception. Composition agreements with several creditors have universally been held binding on the theory of consideration first suggested as to subscription contracts. As Williston said in his first edition, "the doctrine that promises in composition agreements are supported by valid consideration must be regarded as exceptional."[94] Also we must note the tendency to break away from the requirement of consideration where a less sum than a liquidated sum now due is accepted in full satisfaction.[95]

Have not the exceptions swallowed the rule? Shound not a legal requirement growing out of the exigencies of medieval procedure, which leads to so many unhappy results,[96] is so difficult of definition that it has been the subject of endless debate,[97] and in the best form in which a group of legal scholars could put it was put subject to so many exceptions,[98] be recognized as an anachronism and done away with?[99] It is significant that the English Law Revision Committee, to which the question of consideration was referred by the Lord Chancellor, so recommended.[100]

---

[90] Johannessen v. Munroe, 152 N.Y. 641 (1899); Hershey, Letters of Credit, 32 Narvard Law Rev. 1, 16-19 (1918).

[91] McCurdy, Commercial Letters of Credit, 35 Harvard Law Rev. 539, 574 ff. (1922).

[92] Border National Bank v. American National Bank, 282 Fed. 73, 79 (1922).

[93] Hershey, Letters of Credit, 32 Harv. Law Rev. 1, 19-20 (1918). See also Gutteridge, The Law of Bankers' Commercial Credits, 23-28 (1932).

[94] 1 Williston, Contracts (1 ed. 1920) § 120, p. 270. But compositions under the Bankruptcy Act are a matter of statute.

[95] Gaston v. Savin, 137 Ohio St. 551 (1941).

[96] See Wigmore's note in 3 Ill. Law Rev 461-462 (1908) and Lord Dunedin's comment in Dunlop Pneumatic Tyre Co. v. Selfridge & Co. [1915] A.C., 847, 856.

[97] Ames, Two Theories of Consideration, 12 Harvard Law Rev. 515 (1899), 13 id. 129; Anson, Contracts, 80 (1880); Ashley, The Doctrine of Consideration, 26 Harvard Law Rev. 429 (1913); Ballantine, Mutuality and Consideration, 28 Harvard Law Rev. 121 (1914); Ballantine, Is the Doctrine of Consideration Senseless and Illogical? 11 Michigan Law Rev. 423 (1913); Beale, Notes on Consideration 17 Harvard Law Rev. 71 (1903); Gardner, An Inquiry Into the Principles of the Law of Contracts, 46 Harvard Law Rev. 1, 9-12, 23-24 (1932); Holdsworth, The Modern History of Consideration, 2 B.U. Law Rev. 87, 142 (1922); Langdell, Mutual Promises as a Consideration for Each Other, 14 Harvard Law Rev. 496 (1901); Lorenzen, Causa and Consideration in the Law of Contracts, 28 Yale Law Journ. 621 (1919); McGovney, Irrevocable Offers, 27 Harvard Law Rev. 644 (1914); Pawate, Contracts and the Freedom of the Debtor in the Common Law, chap. 4 (1953); Pollock, Contracts (10 ed. 1936) 164-193; Pound, Consideration in Equity, 13 Illinois Law Rev. 667 (1919); Pound, Introduction to the Philosophy of Law, 271-282 (1922); Whittier, The Restatement of Contracts and Consideration, 18 California Law Rev. 611 (1930); Wigmore, The Scientific Role of Consideration in Contracts, Legal Essays in Tribute to Orrin Kipp McMurray, 641 (1935); Williston, Consideration in Bi-Lateral Contracts, 27 Harvard Law Rev. 503 (1914); 1 Williston, Contracts (2 ed.) §§ 100-104 (1936).

[98] Restatement of Contracts, §§ 75-84, 85-94 (1932).

[99] 8 Holdsworth, History of English Law (2 ed. 1937) 47-48; Lord Wright, Ought the Doctrine of Consideration to be Abolished from the common Laiw? 49 Harvard Law Rev. 1225 (1937).

Coming back now to the problem stated at the outset, how shall we deal with it as the law stands today? As has been seen, a few American courts have taken the bull by the horns and found a mandate without a *res*.[101] The American Law Institute found a way round, although by no means a clearly marked path. It formulated this as a recognized proposition of the American law of contracts :

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which induces such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise."[102]

This is an adoption of the "promissory estoppel" theory of consideration or the injurious reliance theory of what constitutes a contract. Although in 1920, twelve years before section 90 of the Restatement was published, Professor Williston was able to cite two decisions of the House of Lords, one of the Supreme Court of the United States and nineteen decisions of the highest state courts in fifteen states for the proposition that "a deteriment incurred in reliance on a promise is not valid consideration unless the detriment was requested as a consideration,"[103] by 1948 sixteen states and half of the federal circuits had followed the section in decision or dictum[104]. Obviously the courts have welcomed an escape from the bargain theory and its consequences even though it had been proclaimed in characteristically striking phrase by Mr. Justice Holmes as late as 1903.[105] "Promissory estoppel" is not a satisfying substitute for consideration. There is nothing in these cases within any proper use of that grossly overworked term estoppel, too often used as what William James used to call a solving word brandished at difficult problems as Habib in the Arabian Nights waved his scimiter and cried out the magic word, whereupon forthwith all obstacles vanished and all enemies were paralyzed. The Restatement cannily avoids refering its proposition to estoppel or to any general principle but gives us a more satisfactory result than the requirement of consideration afforded but does so after the manner of legislation by a rule for a particular type of case. But it has not too much confidence in its rule, qualifying it in application by providing it shall only be invoked where injuctice cannot otherwise be avoided. This qualification, appropriate for equitable remedies where there is an alternative remedy at law, is a doubtful expedient in the law of contracts where we are not dealing with added security to interests recognized and protected by ordinary legal remedies. Moreover, contract is a fundamental institution of the economic order.

In an ingenious article entitled "Reliance on Gratutitous Promises"[106] Professor Seavey tells us that there are three possible ways of dealing with a case where there has been a failure to perform a gratutitous promise made in good faith and relied upon by the promisee. One is the course taken by Chancellor Kent and the orthodox theory of contract in the common law in the nineteenth century. This, he says rightly, is not consistent with modern reasoning.[107] A second is the rule of § 90 of the Restatement of Contracts. This, he says, "frankly recognizes the reliance element in the law of contracts and, to a modified extent, substitutes reliance for the bargaining element without which simple contracts are not normally enforceable." "By its limitation," he adds, "to those situations in which justice cannot be done if the rule is not used, it properly indicates the use of equitable principles and is a warning against its indiscriminate use in non-bargaining transactions."[108] But is it

---

[100] Law Revision Commission, Sixth Interim Report (1937). Compare the New York Real Property Law, § 279 which makes five exceptions to the requirement of consideration.

[101] See ante note 89.

[102] Restatement of Contracts, § 90.

[103] 1 Williston, Contracts (1 ed.) § 139, note 27, pp. 308-309.

[104] The cases are collected in the 1948 supplement to the Restatement, p. 196. See also Promissory Estoppel in California, 5 Stanford Law Rev. 783 (1953).

[105] Wisconsin & M.R. v. Powers, 191 U.S. 379, 386.

[106] 64 Harvard Law Rev. 913 (1951).

[107] Ibid. 925.

wise to retain the requirement of a bargain as the normal principle and then provide for a quasi-equitable departure and special rule where justice cannot be done otherwise. It is often difficult enough to evaluate degrees of hardship in connection with equitable remedies in the concurrent jurisdiction of equity. To make such valuation the criterion of enforceability of a promise may lead in the direction of section 406 of the Soviet Civil Code and make decision depend on the relative economic position of the parties.

The third way of dealing with the situation according to Professor Seavey, is to use principles of the law of torts rather than of contract. He says that the rationale of section 90 of the Restatement of Contracts is "that justice requires the defendant to pay for the harm caused by foreseeable reliance upon the performance of his promise. The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment."[109] But the law of torts is burdened today with enough new problems without shifting to it difficult problems of enforcing promises. He admits that there is no statement in the Restatement of Torts which deals with this type of situation. A very considerable re-adjustment of tort doctrine will be required and one may question whether that will be worth the effort so long as there is a simpler and easier way out to which what is increasingly the course of judicial decision will adjust itself without effort.

It is submitted that the wise course is simply to abrogate the requirement of consideration. This will turn from fifteen to seventeen supposed exceptions into ordinary cases of a principle of the binding force of a promise, and will clear away a mass of confusion which the jurists of Continental Europe have escaped. If it be said how shall we know what makes an enforceable promise if we cease to call for either form or consideration, my answer is by inquiring whether the asserted promise was made as a serious declaration of intention which the promisor expected the promisee to accept as such and himself to preform. It should be enough to hold it to the general requisites of a legal transaction.

---

[108]Ibid.

[109]Ibid. 926.

The vigilant, and not the sleepy, is assisted by the Laws. (*Wing—692*)

SHAKESPEARE AND LAW

By

THE HON'BLE MR. JUSTICE P. B. MUKHARJI, (*Judge, High Court, Calcutta*)

The works of Shakespeare are amongst the most glorious and priceless heritages of the English nation. So is the English legal system of justice. Curiously enough the former abounds in critical references to the latter. Indeed Shakespeare's constant and confident use of dry legal terms, that acquired new horizons of felicity and expressiveness in the hands of that great master of minds and men, evokes our admiration and wonder. Here Hon'ble Mr. Justice Mookherjee, illustrates with his great scholarship in Shakespearean literature, the innumerable references to law and legal terms in Shakespeare's writings and the intimacy that Shakespeare had with Law and its ways [Editor].

It is a stimulating paradox of life that England's greatest poet and dramatist should have chosen to be the most uncompromising critic of England's greatest blessing and possession, the English Law and the English legal system of justice. Shakespeare's legal knowledge appears from his constant and confident use of legal terms and their frequent recurrence in every play, in almost all the poems and even in the Dedications that he made. Our wonder at this use of legal expressions is not so much that Shakespeare understood them so well as in the fact that the man who commanded the most versatile vocabulary that any English writer has ever been able to wield, should have used them with such persistence. He did not need them as instruments of expression because his resources in the treasuries of words were too vast for such an appeal. The legal terms acquired new horizons of expression in the hands of this great master of words and thoughts and thus manifested new potentialities which till then were untapped. They came from the mouth of almost every person and every dramatic character that he had created, from the Queen, from the child, from the Merry Wives of Windsor, from the Egyptian fervour of Cleopatra, from the love-sick Paphian Goddess, from violated Lucrece, from Lear, from Hamlet, from Othello. They appear in Shakespeare's soliloquies, in his Sonnets, from Falstaff, and from melancholy Jaques. He utters them at all times and on all occasions. The drama of human emotions and ambitions found the terms of law an expressive vehicle. These emblems of his industry are woven into his style like brilliant decorations in the purpled robe of law. All this has led to the speculation that Shakespeare must have studied in an Attorney's office. But that will remain always a conjecture. Shakespeare is the great exempler who showed that law and literature could combine to fashion the most moving and impressive expressions.

There is evidence, both intrinsic and extrinsic, that Shakespeare had little love for Law and Lawyers. It is not unlikely that his contacts with law have been such as to give him the bitter taste. From 1578 when William Shakespeare was 14 years of age, his father's fortune declined to such an extent that his properties had to be sold or mortgaged. He was involved in costly litigation and even imprisoned for debt. In 1586 when a distress was issued upon his goods, it was discovered that there were, in fact, no goods upon which to distrain. It is said that the great poet himself was prosecuted, in law, by Sir Thomas Lucy for a poaching adventure in Charlecote Park, Worcestershire. According to some biographers, this led to his leaving the native county for some time. Such experience as this was not likely to incline the

poet to develop an appreciation of the great legal system which England has given to the world.

In King Heary VI, Shakespeare declares, "The first thing we do, let us kill all the lawyers." This was a very favourite theme of the great poet. When, through the mouth of Hamlet, he catalogues the ills "That flesh is heir to", he is not slow to mention "the law's delay" which expression since then has become proverbial and a most convenient stick in the hands of subsequent critics of later generations to beat the law with. Such bitterness appears again in Hamlet in the famous Churchyard Scene where the lawyer's skull is the celebrated graveyard attraction. Here are Shakespeare's own words:—

> "Why may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks? Why does he suffer this rude knave now to knock him about the scene with a dirty shovel, and will not tell him of his action of battery? This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries: in this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? Will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures? The very conveyances of his lands will hardly lie in this box; and must the inheritor himself have no more?"

That is how Shakespeare hammers the last nail on the coffin of the lawyer.

Nor was Shakespeare slow in his ridicule, and in the mastery of his art, his ridicule was sharp. In King Henry IV, he describes "Shallow and Silence, the decrepit Country Justices exchanging reminiscences of their legal education and selecting recruits for Falstaff's draft". In the Merry Wives of Windsor, he tells you "a Squire in the County of Gloucester, Justice of the Peace and Coram" behaving in a manner unworthy of the dignity of the Bench.

In 'As You Like It', you get the Shakespearian picture of a Judge in these famous and inimitable words:—

> "And then the justice,
> In fair round belly with good capon lin'd,
> With eyes severe and beard of formal cut,
> Full of wise saws and modern instances,
> And so he plays his part."

That was how England's great poet and dramatist drew the image of dignity, repository of learning, the fountain of justice. That is very nearly the picture of John Bull which you see in the Punch. In Henry V, he also has a dig at the lazy Judge in these words:—

> "The sad-ey'd justice, with his surly hum,
> Delivering o'er to executors pale
> The lazy yawning drone."

King Lear has some of the bitterest passages against Law, Lawyers, and Justice. Listen to what Shakespeare says in King Lear on the escape of Generil during her trial:—

> *"Lear*: I shall be done; I will arraign them straight. Come, sit thou here, most learned justicer:—(To Edgar)
> Thou, sapient sir, sit here (To the Fool)—
> Now, you she-foxes!
>
> *Edg*: Look, where he stands and glares,
> Wantest thou eyes at trial, madam?
>
> *Lear*: I'll see their trial first.—Bring in the evidence.—
> Thou robed man of justice, take thy place,—(To Edgar)
> And thou, his yoke-fellow of equity, (To the Fool)
> Bench by his side:—you are o'the commission
> Sit you too.
>
> *Edg*: Let us deal justly.
>
> *Lear*: Arraign her first; 'tis Generil. I here take my oath before this honourable assembly, she kicked the poor king her father.
>
> *Fool*: Come hither, mistress. Is your name Generil?
>
> *Lear*:—She cannot deny it.
>
> *Fool*: Cry you mercy, I took you for a joint-stool.
>
> *Lear*: And here's another, whose warp'd looks proclaim

What store her heart is made on.—
Stop her there!
Arms, arms, sword, fire!—Corruption
in the place!—
False justicer, why hast thou let her
'scape?"

In the King Henry VI, Shakespeare is eloquent. Cado's announcement of his intention to reform the laws by killing the lawyers, and to make it felony to drink small bear; his discourse on the destructive effect of parchment, wax, and seals; the charge against the clerk of Chatham that he can make obligations and write court-hand; the order to pull down the inns of court; the command to burn all the records of the realm; the fear of biting statutes—are the highlights of this scene in the great drama. So when Lord Say is brought before him, Cado's language is judicial, and he asserts his "jurisdiction regal." Say has "traitorously" erected a grammer school, and his use of the word is not only correct, but indispensable because the strict law is that treason must be laid to have been committed traitorously, this word being indispensably necessary. It seems to suggest that Shakespeare not only knew the legal vocabulary but also the law itself. I will give you here Cado's own words which Shakespeare uses:—

"*Cado*:—The three-hooped pot shall have ten hoops and I will make it felony, to drink small bear; all the realm shall be in common, and in Cheapside shall my palfry go to grass.

Dick: The first thing we do, let's kill the lawyers.

Cado: Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man? Some say the bee stings: but I say 'tis the bee's wax, for I did but seal once to a thing, and I was never mine own man since. How now? Who's there?

Smith: The clerk of Chatham: he can write and read.

Cado: O monstrous!

Smith: We took him setting of boys' copies.

Codo: Here's a villain!

Smith: He'as a book in his pocket, with red letters in't.

Cado: Nay, then he is a conjuror.

Dick: Nay, he can make obligations, and write court-hand.

Cado: So, sirs: Now go some and pull down the Savoy, others to the inns of court; down with them all.

Dick: I have a suit unto your lordship.

Cado: Be it a lordship, thou shalt have it for that word.

Dick: Only that the laws of England may come out of your mouth.

John: Mass, 't will be sore law then; for he was thrust in the mouth with a spear, and 'tis not whole yet.

Smith: Nay, John, it will be stanking law, for his breath stinks with eating toasted cheese.

Cado: I have thought upon, it, it shall be so. Away, burn all the records of the realm, my mouth shall be the Parliament of England.

John: Then we are like to have biting statutes, unless his teeth be pulled out."

Coleridge once said, "A young author's first work almost always bespeaks his recent pursuits." He could have said with no less appropriateness that no author can really hide his pursuits. It is difficult for any author to escape the stamp of his associations in life, and they are consciously or unconsciously betrayed by his style, his theme, his prejudices, his sympathies, and his antipathies. Shakespeare, the great master of English literature, could not escape that fate. Sir Walter Scott was called to the Bar and his chivalrous novels testify his legal proficiency. Fielding could not completely shed his experience as a Magistrate in his writings and it appears in his examination of Patridge, in the conspiracy beteween Lady Booby and Lawyer Scout against Fanny. More direct is the evidence you find in Donne's writings. Donne was a student at Lincoln's Inn, and even while describing the courtship of a Barrister he uses

the most felicitous language to show how law can join hands with romance. To give an example, these are his lines:—

—"he throws,
Like nets or lime twigs, wheresoe'r he goes,
His title of barrister on every wench,
And woos in language of the pleas and bench.
A motion, lady! Speak, Coscus. I have been
In love o'er since tricesime the queen.
Continual claims I've made, injunctions get
To stay my rival's suit, that he should not proceed; spare me, in Hilary term I went;
You said if I returned next 'size in Lent,
I should be in remitter of your grace.
In th' interim my letters should take place of affidavits."

Shakespeare ridicules the law on many points. His ridicule of the law against suicide and the denial of a Christian burial to a suicide and his pungent remarks on the law of inquest appear in a well-known passage in Hamlet. The words of his Clowns are:—

"*First Clown*: Give me leave. Here lies the water; good; here stands the man; good; if the man go to this water, and drown himself, it is, will he, nill he, he goes,—mark you that; but if the water come to him and drown him, he drowns not himself: argal, he that is not guilty of his own death, shortens not his own life.

Sec. Clown: But is this law?

First Clown: Ay, marry, is't; crowner's quest law."

Shakespeare's judgment on circumstantial evidence and its value is illuminating. With great legal craft, this master of language and imagination eloquently points to the simulation of evidence which fabricators create by perverting or inventing circumstances and exposes the unreliability of such evidence as in the incident of exhibition of Joseph's coat to Jacob, the existence of the mole on Imogen's snow-pure breast, in Lady Macbeth's frantic efforts to smear the grooms' faces with blood and in Iago's use of the handkerchief. It appears that Shakespeare pricked the bubble of the judicial doctrine that circumstances cannot lie and his purpose is to show that circumstances themselves can be invented, framed and devised in diverse ways by the endless villainy of human nature and thus misguide and defeat truth and justice.

Shakespeare always portrays the legal atmosphere with consummate skill. The most famous scene on this point occurs in his Merchant of Venice in the trial of Shylock by Portia.. The fidelity shown in representing the proceedings in a Court of Justice is almost perfect. With exemplary exactitude, this great dramatist brings out the perpetual conflict between legal justice and mercy and the ability of law always to find sufficient casuistry to defeat obvious injustice which is the recurrent danger in a mechanical application of law. Shylock demands payment "according to the tenor" of his bond, and "tenor" is a legal term in the context. The Judge is bound by his oath to apply the law. But then true justice can always discover that there will be no blood, if a pound of flesh only is the legal exaction of the bond. It is thus how justice does the legal act, avoids the dilemma between justice and sentiment by finding legal reason to temper justice with mercy. Here are some of the words of this famous scene:—

"*Por*: A pound of that same merchant's flesh is thine;
The Court awards it, and the law doth give it.

Shy: Most rightful judge!

Por: And you must cut this flesh from off his breast,
The law allows it, and the court awards it.

Shy: Most learned judge:—A sentence; come, prepare.

Por: Tarry a little;—there is something else—
This bond doth give thee here no jot of blood;
The words expressly are a pound of flesh:
Take then thy bond, take thou thy pound of flesh;
But, in the cutting it, if thou does shed

One drop of Christian blood, thy land and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.

Gra: O upright judge!—Mark, Jew;— O learned judge,

Shy: Is that the law?

Por: Thyself shall see the act,
For, as thou urgest justice, be assur'd
Thou shalt have justice more than thou desir'st."

When Portia's appeal to Shylock for the quality of mercy went in vain, law followed its inexorable course. Incidentally this shows Shakespeare's full grasp of one of the fundamental principles of interpretation: to follow the express language where there is no ambiguity.

Shakespeare was not slow to pronounce on the judicial functions of Courts acting as guardians of infants. He satarised that branch of the Law in King John in these words:—

"*K. John*: From whom has thou this great commission.
To draw my answer from the articles?

"*K. Phi*: From that supernal judge, that stirs good thoughts
In any breast of strong authority,
To look into the blots and stains or right.
That judge hath made me guardian to this boy.
Under whose warrant, I impeach thy wrong,
And by whose help I mean to chastise it.

"*K. John*: Alack, thou dost usurp authority.

"*K. Phi*: Excuse, it is to beat usurping down.

Shakespeare's criticism of "strict statutes and biting laws" is as merciless as could be. In Measure for Measure, Shakespeare uses his master vocabulary upon this subject, and his words are:—

"We have strict statutes, and most biting laws,
The needful bits and curbs to headstrong steeds,
Which for these fourteen years we have let sleep,
Even like an o'ergrown lion in a cave,
That goes not out to prey. Now, as fond fathers
Having bound up the threatening twigs of birch,
Only to stick it in their children's sight,
For terror, not to use, in time the rod
Becomes more mock'd than fear'd; so our decrees,
Dead to infliction, to themselves are dead;
And liberty plucks justice by the nose;
The baby beats the nurse, and quite athwart
Goes all decorum."

The system of trial by Jury which is regarded as one of the basic guarantees of freedom in Anglo-Saxon countries provoked as much controversy during the days of Shakespeare as it does now. Shakespeare gave vent to this feeling on trial by Jury in these words in Measure for Measure:—

"The jury, passing on the prisoner's life,
May, in the sworn twelve, have a thief or two
Guiltier than him they try. What's open made to justice,
That justice seizes: what know the laws,
That thieves do pass on thieves?"

Shakespeare's intimacy with Law, Lawyers, and the legal atmosphere of his country was far too great to completely obliterate at least some appreciation of the independence of Judges in the English legal system. Henry Wriothesly to whom Shakespeare dedicated "the first heir of his invention" was the grandson of a common-law lawyer, who was Lord Chancellor from 1544 to 1547. The Inns of Court of that time were the scenes of lively dramas of great attraction where one could see the relationship between the most dramatic profession of real life and that which mimics life on the stage. The social history of England at that time contains indication that law and drama had not then separated so much as they have done now, and it is not unlikely that Shakespeare participated in the dramatic performances frequently staged then under the auspices of the Inns of Court. The pride of the English legal system is the independence of the Judiciary which rejected

alike the favours of the executive and the acclamation of the people. One of the most moving passages in Shakespeare in appreciation of the Judges' independence appears in Henry IV in the following dialogue between the King and the Chief Justice, between Henry V lately becoming King and the Chief Justice who had formerly committed him for contempt:—

"*King*: You all look strangely on me; and you most; (To the Chief Justice) You are, I think, assur'd I love you not.

"*Ch. Just*: I am assure'd' if I be measur'd rightly,
Your majesty hath no just cause to hate me.

"*King*: No!
How might a prince of my great hopes forget
So great indignities you laid upon me?
What! rate, rebuke, and roughly send to prison,
The immediate heir of Eng'and! Was this easy?
May this be wash'd in Lethe, and forgotton?

Ch. Just: I then did use the person of your father
The image of his power lay then in me;
And in the administration of his law,
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king whom I presented,
And struck me in my very seat of judgment;
Whereon, as an offender to your father,
I gave bold way to my authority,
And did commit you. If the deed were ill,
Be you contented, wearing now the garland,
To have a son set your decrees at nought;
To pluck down justice from your awful bench,
To trip the course of law, and blunt the sword
That guards the peace and safety of your person:
Nay, more, to spurn at your most royal image,
And mock your workings in a second body.
Question your royal thoughts, make the case yours;
Be now the father and propose a son:
Hear your own dignity so much profan'd,
See your most dreadful laws so loosely slighted,
Behold yourself so by a son disdain'd,
And then imagine me taking your part,
And in your power, soft silencing your son:
After this cold considerance, sentence me;
And as you are a king, speak in your state,
What I have done that misbecame my place,
My person, or my liege's sovereignty.

King: You are right, justice, and you weigh this well;
Therefore, still bear the balance and the sword:
And I do wish your honours may increase,
Till you do live to see a son of mine,
Offend you, and obey you, as I did.
So shall I live to speak my father's words,
"Happy am I, that have a man so bold,
That dares do justice on my proper son;
And not less happy, having such a son,
That would deliver up his greatness so,
Into the hands of justice." You did commit me:
For which, I do commit into your hand
The unstained sword that you have us'd to bear;
With this remembrance,—that you use the same
With the like bold, just, and impartial spirit,
As you have done 'gainst me."

Apart from his famous dramas, Shakespeare's Sonnets also reveal the same preference for legal terms. I can give you one instance where he makes the most liberal use of legal terms all over his Sonnet, which he as a master draftsman could easily have avoided. Here is an example:—

"So now I have confess'd that he is thine,
And I myself am mortgaged to thy will;
Myself I'll forfeit, so that other mine
Thou wilt restore, to be my comfort still;

But thou wilt not, nor he will not be free,
For thou art covetous, and he is kind;
He learn'd but, surety-like, to write for me,
Under that bond that him as fast doth bind.
The statute of thy beauty thou wilt take,
Thou usurer, that put'st forth all to use,
And sue a friend, came debtor for my sake;
So him I lose through my unkind abuse.
Him have I lost; thou hast both him and me;
He pays the whole, and yet I am not free."

You can see such words in this Sonnet as "confess", "mortgage", "forfeit", "bond", "surety", "usurer" and "statute" which prove the great dramatist's predelictions for the legal jargon.

I can multiply instance after instance from Shakespeare's writings to show that perhaps no other world figure in literature resorted so much to law and legal imageries as Shakespeare had done. The time at our disposal, however, is limited for such purpose. But no brief account of Shakespeare And Law can be complete without at least a bare reference to the controversy about the identity of Shakespeare with that great lawyer Bacon. It is said that Shakespeare was no other than Bacon himself. Not a little support of this theory is drawn from the fact of Shakespeare's almost perfect use of legal terms and his frequent recourse to draw his imageries from the legal world and some of his most faithful portrayals of legal scenes in Courts of Law. Ben Johnson loved Shakespeare and was the friend of Francis Bacon, and to him Shakspeare and Bacon were different persons. Milton who was a child when Shakespeare died and who lived in London and enjoyed the pleasures of the theatrical world always considered Shakespeare to be a different person from Bacon. Charles I was only 16 when Shakespeare died. It is said that Bacon dedicated to Charles I his History of Henry VII. The works of Shakespeare were constant companions of Charles for which he was supposed to have been rebuked by Milton because in Milton's puritanism the drama was still a sinful affair. Bacon was the great figure in the Court of Chancery for many years when the battle of Jurisdiction was fought between Ellesmere and Coke. Shakespeare does not appear in any of his works to show any very great interest in Chancery and equity jurisprudence. It must be emphasised that the language of law which Shakespeare spoke and wrote, was the language of the common-law and not of Equity Jurisprudence. He was the great amateur of Common-law and he voiced some of the well-known public grievances against Common-law at the time. Shakespeare dedicated Venus and Adonis, and the Rape of Lucrece, to the Earl of Southampton, and it is well-known that Shakespeare was the recipient of great munificence at the hands of that noble man. It has been suggested that if Bacon was the same person as Shakespeare, it is unlikely that within a few years Bacon should have appeared as a counsel voluntarily offering his services against both Essex and Southampton in that trial which besmirched the reputation of Bacon or that Bacon should have taken upon himself in his Declaration of the Treason of Robert, Earl of Essex, the odious task of proving the complicity of his friend and patron in that conspiracy. It is not the object of this talk to come to a decision on the controversy whether Bacon and Shakespeare were the same person or different persons. The reference to such controversy is only to show that it so happens that Shakespeare's name is linked up with the name of Bacon, one of the greatest figures in law. Law, therefore, haunted Shakespeare in life and still haunts his great memory.

SPEAKING CONSTITUTIONALLY

By

THE HON'BLE MR. JUSTICE D. N. SINHA, (*Judge, High Court, Calcutta*)

Hon'ble Mr. Justice Sinha gives us a masterly, comparative estimate of the provisions for fundamental rights contained in the respective constitution of India, Japan and the U.S.S.R—[*Editor*].

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by the creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the Consent of the governed—That whenever any form of Government becomes destructive of these ends, it is the Right of the people to alter or abolish it and to institute new Government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness".

These historical words are contained in the American Declaration of Independence, 1776 whereby the United States of America, declared their own independence and ceased their British connection. This was followed by a written constitution and the Bill of Rights, containing amendments to the Constitution. History repeated itself in India, with the difference that there was enacted a most unique thing in human exeperince, namely the voluntary liquidation of the greatest Empire of all times. On the 26th November, 1949, the Constituent Assembly passed the draft Constitution, the preamble of which runs as follows :

"WE THE PEOPLE OF INDIA having solemnly resolved to constitute India into a SOVEREIGN DEMOCRATIC REPUBLIC and to secure to all its Citizens :
JUSTICE, social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
and to promote among them all
FRATERNITY assuring the dignity of the individual and the unity of the nation;
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

It is not my object in this short article to give a critical analysis of the Indian Constitution as a whole. I will only refer to one aspect of it, namely, the Chapter on 'Fundamental Rights.'

This is with the object of an interesting comparison with two other constitutions which have come into force in recent years, namely that of the Union of Soviet Socialist Republics (1936) and Japan (1946). The 'Fundamental Rights' are dealt with in Part III of our constitution. *Article* 14 deals with the equality before the law or the equal protection of the laws. Put simply it means that all persons equally situated should derive equal treatment from the law and no one person or a class shall be singled out for hostile legislation. This is a counter part to section (1) of the XIVth amendment to the American Constitution. *Article* 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. *Article* 16 ensures equality of opportunity in matters of public employment. *Article* 17 abolishes untouchability in any form. *Article* 18 abolishes all titles, not being a military or academic distinction. *Article* 19 which is the most important article in this part, guarantees seven freedoms—the freedom of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to acquire, hold and dispose of property; and to practise any profession, or to carry on any occupation, trade or business. *Article* 20

provides that no one is to be convicted of any offence except for violation of a law in force and also protects against the penalty being in excess of the law in force at the time of the Commission of the offence. It also prevents 'Double jeopardy' and an accused being called upon to testify against himself. *Article* 21, lays down that no person shall be deprived of his life or liberty except according to procedure established by law. *Article* 22 grants protection against arrest and detention without complying with certain formalities *e.g.* informing the person arrested of the grounds, affording him facilities of defence and producing him before a magistrate. *Article* 23 prohibits traffic in human beings or forced labour. *Article* 24 prohibits employment of children in factories, mines and other hazardous employment. *Article* 25 protects the freedom of conscience and the right freely to profess, practise and propagate religion. *Article* 26 grants freedom to manage religious affairs. *Article* 27 prevents taxes being levied for promotion of any particular religion. *Article* 28 prohibits religious instructions being imparted in any institution maintained by the State and prevents compulsory attendance in any form of religious instructions in any educational institution recognised by the State or receiving aid from State funds. *Articles* 29 *and* 30 safeguard the right of minorities. *Article* 31 deals with the compulsory acquisition of property by the State for public purposes and lays down the salutary principle that no property shall be acquired without payment of adequate compensation. *Article* 32 deals with the rights to move the Supreme Court.

Coming to the Japanese Constitution, the preamble is very interesting and runs as follows:

"We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful co-operation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this constitution is founded. We reject and revoke all constitutions, laws, ordinances and rescripts in conflict herewith.

We the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationships and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honoured place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance, for all time from the earth.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We the Japanese people, pledge our national honor, to accomplish these high ideals and purposes with all our resources."

The following provisions may be quoted:—

Article 11. The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

Article 13. All of the people shall be respected as individuals. Their right to life, liberty and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and other governmental affairs.

Article 14. All of the people are equal under the law and there shall be no discrimintion in political, economic or social relations because of race, creed, sex, social status or family origin.

Peers and Peerage shall not be recognised...

Article 16. Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment repeal or amendment of laws, ordinances or regulations and for other matters; nor shall such persons be discriminated against for sponsoring such a petition.

Article 17 Every person may sue for redress as provided by law from the state or a public entity, in case he has suffered damage through illegal act of any public official."

Article 18 prohibits bondage or involuntary servitude except as punishment for crime. *Article* 19 guarantees freedom of thought and conscience. *Article* 20 guarantees freedom of religion and precludes the State from granting any privilege to any particular religious organization. *Article* 21 guarantees freedom of assembly and association, as well as speech, press and all other forms of expression and prohibits censorship. *Article* 22 grants freedom to choose and change residence or occupation to the extent that it does not interfere with the public welfare. Freedom of movement and change of nationality is guaranteed. *Article* 23 guarantees Academic freedom. *Article* 24 is interesting and may be quoted:

"Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual co-operation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property right, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."

Article 25 guarantees the right to maintain minimum standards of wholesome and cultured living. *Articles* 26 *and* 27 are important and may be quoted:

"*Article* 26—All people shall have the right to receive an equal education correspondent to their ability, as provided by law. All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.

Article 27—All people shall have the right and obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law. Children shall not be exploited."

Article 28 confers right to workers to organize bargain and act collectively.

Article 29 guarantees property rights and provides that requisitions for public purposes must carry just compensation. *Article* 31 guarantees life and liberty *Article* 32 guarantees recourse to Courts. *Article* 33 prevents apprehension without a lawful warrant. *Article* 34 prevents arrest and detention without being informed of the charge and provides for legal aid and production in Court. *Article* 36 prohibits torture or cruel punishments.

Article 37 specifies how criminal trials are to be conducted.

Article 38 deals with confessions and prevents a man being compelled to testify against himself. *Article* 39 prevents double jeopardy and *Article* 40 ensures the application of the principle of "antrefois acquit."

There is no preamble to the Soviet Constitution, but the speech of the late Josef Stalin in introducing the draft Constitution serves that purpose. It shows that the approach in this case is somewhat different from the democratic countries. This is what he says:

"What distinguishes the draft of the new constitution is the fact that it does not confine itself to stating the formal rights of citizens but especially stresses the guarantees of these rights, the means by which these rights can be exercised. It does not merely proclaim equality of rights for citizens, but ensures it by giving legislative embodiment to the fact that the regime of exploitation has been abolished, to the fact that the citizens have been emancipated from all exploitation. It does not merely proclaim the right to work, but ensures it by giving lagislative embodiment to the fact that there are no crises in Soviet Society and that unemployment has been abolished. It does not merely proclaim democratic liberties, but legislatively ensures them by providing definite material resources....."

Let us see how these principles are carried out by the constitution itself. The following provisions are worthy of being quoted:

"*Article* 118—Citizens of the U.S.S.R. have the right to work, that is, the right to guaranteed employment and payment for their work in accordance with its quantity and quality....."

"*Article* 119—Citizens of the U.S.S.R. have the right to rest and leisure. The right to rest and leisure is ensured by the establishment of an eight-hour day for factory and office workers, the reduction of the working day to seven or six hours for arduous trades and to four hours in shops where conditions of work are particularly arduous, by the institution of annual vacations with full pay for factory and office workers, and by the provision of a wide network of sanatoria, rest homes and clubs for the accommodation of the working people.

Article 121—Citizens of the U.S.S.R. have the right to education.....

Article 122—Women in the U.S.S.R. are accorded equal rights with men in all spheres of cultural, political and other public activity.

Article 123—Equality of rights of citizens of the U.S.S.R. irrespective of their nationality or race in all spheres of economic government; cultural, political and other public activity is an indefeasible law. Any direct or indirect restriction of the rights of, or, conversely, the establishment of any direct or indirect privileges for, citizens on account of their race or nationality, as well as any advocacy of racial or national exclusiveness or hatred and contempt is punishable by law." This international and inter-racial basis of the fundamental rights is worthy of notice.

Article 124—provides for freedom of religious worship. *Article* 125—guarantees four freedoms,—the freedom of speech, freedom of the press, freedom of assembly and freedom of street processions and demonstrations.. *Article* 126—guarantees the right of association. *Article* 127 guarantees the inviolability of the person, homes of citizens and privacy of correspondence.

It will be observed that both the Japanese constitution as well as the constitution of the U.S.S.R. guarantees the right to education. In fact the Japanese constitution makes it obligatory upon guardians to educate their children and upon the state to provide free education. There is no such provision in the Indian Constitution. The question of marriage forms the subject matter of the Japanese Constitution but there is no corresponding provision in the Indian counterpart. The U.S.S.R. constitution guarantees employment, rest and leisure, the Japanese constitution guarantees work *i.e.* employment, but there is no such thing in the Indian Constitution.

A casual study of the Japanese constitution shows that many of the fundamental rights are so wide in their scope that one wonders how they can possibly be enforced. For example the right to maintain a minimum standard of "wholesome and cultured living". Then again, censorship having been entirely abolished, one wonders what would happen in time of war—unless of course one remembers that by the preamble to the Japanese Constitution, war has been virtually abolished.

But whether a constitution achieves all its professed ideals is prehaps not very important. What is important is that mankind is progressively realising that human life and progress is meaningless unless there are the fundamental safeguards, guaranteeing to the individual, the elementary decencies of life. How far such safeguards should go and how they are to be translated into practice depends upon circumstances and the genius of a people. The Courts merely perform their duties as sentinels, so that these guarantees so purposively granted and so bravely proclaimed should not be set at naught. A constitution cannot be considered as rigid or immutable. Our own constitution will no doubt change as we progress in the great journey of the nation, this is only the beginning.

ROLE OF THE OPPOSITION IN PARLIAMENT

By

PROF. HIREN MUKERJEE, M.A. (CAL. ET OXON), B. LITT (OXON), BARRISTER-AT-LAW, M.P.

A parliamentary "Opposition" is not an indispensable part of every possible constitutional system....In fact the game between the "Ins" and the "Outs" in the Parliament is often very much unreal. The Opposition in India, if it is to be effective at all, must forego British precedents in this respect. So says Professor Mukherjee here in his usual masterly style.—[Editor]

There are certain comfortable illusions regarding the character of a parliamentary set-up and conventions accruing therein. They derive mainly from what one usually learns from Britain, so often proudly described as the "Mother of Parliaments." If one looks beneath the surface, however, one discovers that much of the vaunted parliamentary wisdom is based on sedulously propagated myths.

In Britain, we hear too often, freedom has slowly broadened down from precedent to precedent. The idea sought to be underlined is that in Britain things evolve slowly, at a respectable peace, illustrating what has been called "the inevitability of gradualness," and ruling out the conception of revolutionary change. It is discreetly forgotten that in that country Kings have been deposed over and over again, and one of them even beheaded, that from Wat Tyler to the Chartists a tradition of militancy has permeated British politics and that it was only Britain's acquisition, largely fortuitous, of an empire and the consequent ability of her ruling class to throw to the workers some crumbs from their table laden with imperial super-profits that has confounded working-class politics and dulled the edge of social discontent and struggle. The tenacity with which the British ruling class tries to cling to its empire and the crafty showmanship with which, for example, it stages the medieval mummery of a Coronation so that its fumes will send the people dosing into a kind of torpor, only prove that the rulers of Britain are well aware of a crisis that threatens to blow up the myth of Britain's ineradicable adherence to certain sacrosanct forms of constitutional respectability.

One of such forms, it appears, is the idea of the Opposition in Parliament, whose leader in the House of Commons has come lately to be even paid a salary out of the public revenues. The House of Commons is reputedly the world's finest club, and those who congregate there are supposed to be engaged, with all the paraphernalia of stage-managed seriousness, in a game of see-saw, Government and Opposition alternating their roles from time to time. As in a play, the atmosphere is rather unreal, and there is little, if any, real change when a Labour Government yields place to its Conservative competitor and *Vice Versa*. Much in the same way, the Democrats in the U. S. A, no more "Democratic" than the Republicans, who in their turn are no more "Republican" than the Democrats, conduct a similar performance. Ability to repeat this kind of performance is supposed to be the yard-stick of parliamentary capacity, and having imbibed this lesson we in India also repeat it whenever an occasion arises and throw gibes, for example, at the Parliamentary ineptitude of the most profoundly civilised of European peoples, the French.

The people of Britain, however drugged they may be by the subtle and cunning propaganda of their rulers, have not always hesitated to express themselves strongly on the banality of Parliamentary party politics. In the 18th Century, when George III wanted not only to reign but also to govern and those

who opposed the "King's friends" had no real policy and programme to offer the country, a doggerel was heard often in the streets of London :

"What this rogue loses, that rogue wins,
"All are birds of a feather,
"Let's damn the Ins and damn the Outs,
"And damn them all together."

Orthodox parliamentarians believe that whatever the structure of society, there has to be an opposition in the Legislature and that from time to time the Opposition should in its turn form the Government. This may very well happen in certain circumstances, but it can by no means be an immutable principle. Even if we take the British example, we see that there are certain mining areas in South Wales where a Labour candidate is not opposed by a Tory for the simple reason that the latter has no support. What will happen if in the whole country the composition and the outlook in every constituency is like that ? Obviously, elections would be generally unopposed in a Party sense. Indeed, this was the dilemma which confronted M. Herbert Morrison a few years ago. What would happen if Socialist policy was a success, if a great bulk of the people were won over and all the constituencies voted Labour ? In that case of course there would not be a Tory party in Parliament. It was too terrible to think, and so Mr. Morrison made the hare-brained suggestion that the ideal composition of Parliament should be two-thirds Labour and one-third Tory! This is the level to which European Social—Democracy deteriorates; this is where "labour lieutenants of the capitalist class" end up ideologically.

In a new society where class war has been eliminated, the see-saw between Government and Opposition playing at politics seems antiquated and somewhat amusing. There, on account of agreement on social objectives, Party politics of the usual parliamentary pattern becomes out of date. Differences over details of work may persist, but the general line is agreed to by all. Society is integrated.

The pre-conceptions of Parliamentary politics and its normal concomitants as found in Britain do not, thus, represent the alpha and omega of political wisdom. This is a matter on which we should be clear. And certainly, we should not expect in the working of Indian Legislatures today a repetition of what happened in nineteenth-century England.

We have in India today the Congress Party in power in the Centre and also except for a few shaky instances, in the States. The Congress Party at present is, whatever certain aspects of its past, a party of Conservatism, a party of the *Status quo*. This is writ large over all it does, its fear of popular movements, its frantic boosting of a Five-Year Plan which seems to be not a prize to be won by the people's enthusiasm but a predicament to be got through, and its contented acquiescence in the control of our economy, and therefore of our politics, by Anglo-American imperialism. Against Congress there is ranged in the legislatures an assortment of parties, some of whom are innocent of ideology and therefore of little account in the fight for a new social order. It is those who wish to see, as speedily as possible, and end to our present crisis-ridden economy and to our inglorious involvement with imperialist interests it is those who wish to bring about an early emergence in India of a new and truly democratic society where exploitation of man by man shall cease, who really constitute the Opposition whether in or out of the Legislatures.

This Opposition cannot function, or even wish to function in Parliament as if an entertaining, and occasionally mildly exciting, game of see-saw is in progress. This Opposition cannot cherish the hope that springs eternal in the breast of British Labourites, for example, that they might also form a Government for a while, play at administration, take care not to effect basic changes, and then be back again as Her Majesty's Opposition. This Opposition tries to link up work in the Legislatures and outside them, to expose the character of class-rule, whatever its cloak, and to help as far as it can the development of mass movement and mass strength to wrest power from the microscopic minority which rules our destinies. This Opposition cannot and must not function in a purely Parliamentary orbit. Bereft of its links with popular movements outside the charmed circle of Parliament, its feet of clay would be obvious and its speeches would be so much waste of breath. Its role can only be fulfilled when it scorchingly exposes the ad-

ministration's basic character, furnishes through such exposure real ammunition for the people's struggle for a better life, and always seeks strength from the only source of a real inspiration—a live, unceasing link with the collective movements of the toiling people. This Opposition cannot feed itself on illusory hopes of an inevitable, if gradual, broadening of Parliamentary liberties till one fine morning we find all our problems solved. This Opposition must make its own contribution, from the platform that Parliament offers, to that growing movement of the people who through their own experience, are being steeled in the effort for fundamental change. If, sometimes, we feel despondent about the rate of its growth in India, we should remember what was said three hundred years ago by an English parliamentarian: "Have no fear; it must be worse, before it is better."

———

**The Marginal note cannot control the meaning of the body of the section if the language employed therein is clear and unambiguous. If the language of the Section is clear then it may be that there is accidental slip in the marginal note rather than that the marginal note is correct and the accidental slip is in the body of the Section itself.*

—*A.I.R.* (4) '53, *Supreme Court* 148

* * * * * *

"*If you are an individual, you weep your tax lot alone. If you are in partnership, you weep your lot in Company, for income-tax affects impartially, so the edict runs. Taxes can now truly be said to pursue one from the cradle to the grave—nay, even beyong it. Those who wish to escape from it have yet a trap-door left. "HAVE NO INCOME AND FEAR NO TAXES". But if this does not suit, one may only console oneself in the philosophic thought that "in constitutional states, liberty is a compensation for heaviness of taxation; in the despotic one, lightness of taxation is a compensation for liberty."

———

ON THE PROPOSED AMENDMENTS TO THE CRIMINAL PROCEDURE CODE

By

SRI AJIT KUMAR DUTTA, ADVOCATE,

(Ex-student)

Two bills to amend the criminal procedure in our country are pending before the Parliament. Though their object is to make judicial administration cheap and expeditious, they contain implications which are extremely dangerous for our personal liberty and right to fair trial. Sri Dutt, who is a member of the Committee appointed by the Calcutta Bar Association to report on the proposed legislations, brought out these mischievous implications in a bold speech delivered at our Annual Legal Conference. The following article is an adaptation of that speech.—[Editor]

Recently there has been a brainwave somewhere to improve our existing penal laws. In their anxiety to effect improvements in our existing penal laws some people have started thinking in a way, which spells danger to our hardwon freedom and to individual liberty.

A Bill—it would be more precise and correct to say two Bills, one by the Government of India and another by a private M. P.—have been introduced in the Parliament for drastic amendment of the Code of Criminal Procedure.

I do not say the procedural law for trials of Criminal cases or the substantive law defining offences and providing punishment therefor as in force in our country are perfect and do not require to be studied afresh. With the change of time, various forces which mould the ways of life of a people change. Social ideals are forever changing. Morals evolve. Immutable character of moral values are no longer accepted and law has to adapt itself to social changes. Law is only crime punished by place and by times. Law is clothes men wear anytime, anywhere.

One apt illustration will demonstrate the truth of this dictum. Advocacy of contraceptives led once to the conviction of Charles Bradlaugh and Annie Besant but now the State Governments are thinking of propagating Birth control.

I therefore do admit and concede that it is not possible to measure the social conduct of present times by an ancient code of social behaviour, and after all, legislatures, by various enactments from time to time, merely lay down the Code of social behaviour. Therefore a progressive people must have adaptablity and should not hesitate to change their laws and approaches to various problems of life. But this adaptability must not degenerate into fickleness.

The two proposed Bills, however, betray profound indifference to, I shall not say ignorance of, the basic principles which should govern legislation.

We are trying to build up in this country a democratic system of state machinery. The judicial system of the country must also fall in line with this ideal and be moulded accordingly. We are also trying to build up a welfare State in contradistinction to a Police State. Any legislation seeking to modify, alter or amend the procedural law of the country must keep that goal in vision.

The proposed amendments, as the "Statement of objects and reasons" says, are intended to make the system of judicial administration more speedy, less cumbersome and less expensive.

There is nothing to oppose this avowed object provided we find that this attempt to introduce *speed* and *economy* is not going to cut at the root of fair trial and interfere with the fundamental liberties of the people. Expedition is necessary but not at the cost of liberty.

In the strength and soundness of a judicial system and in the faith of the people in its judicial system lies the strength of a people and the foundation of a State.

Speed and *economy*: these are the avowed objects of the proposed Bills and I belive that obsessed with them, persons who are responsible for the drafting of the Bills, are seeking to sabotage the attempt to build up in our country a welfare State.

We had been under foreign subjugation for a long time and Police administration in our country had been trained as a punitive force or as an army of occupation. Even though manned by our own men the police administration is still now looked upon with hostility by the people and the police force also behaves like an army of occupation. There is still now no feeling of kinship between the people and the police. Apart from this factual aspect, as State is the prosecutor and the State functions as prosecutor with the help of the police, even in a free country police is not given a blank charter in the matter of prosecuting an alleged offender against law. Before a Court of law, Police administration is a party to a legal proceeding, and therefore safeguards are provided for testing evidence coming from police sources. In the Bill introduced by the Government one tendency is clearly discernible *viz.* to treat *Police papers* (By "Police papers" is meant statements recorded by police either in the course of investigation of an alleged crime or pre-or even post-investigation records), if not as sacrosanct—at least as more trustworthy and reliable than sworn statements of a private citizen, however unassailable may be his integrity.

To illustrate the criticism that I am making, I refer to the amendment proposed in clause 20 of the Bill. In Sessions-triable offences, under the existing law, there are provisions for a full enquiry before a person is committed for trial, where accused persons are given the fullest opportunity to rebut the prosecution allegations by adducing evidence and by cross examination. In the present Bill Sessions-triable offences are classified into two groups—not on the basis of gravity of the offences but on the basis whether police wants a man to be sent up for trial or not.

If the Police wants a man to be tried and submits a report, then there shall be no pre-committal inquiry under Chapter XVIII of the Criminal Procedure Code. Prosecution will not be required to adduce evidence, defence will have no right to test the prosecution evidence by cross examination. Defence will have no right to examine witnesses and prove the falsity of the prosecution case. Defence will have no opportunity to adduce evidence after the charge is framed and will have no right to contend before the Court that the charge is *prima facie* unsustainable and therefore liable to be cancelled.

An accused has no right under the proposed law to get discharged. From the proposed amendment it appears that even the provision by which a Magistrate has been given the power and discretion to discharge an accused has been made inapplicable to a case which is sought to be initiated at the instance of the police. In fact the entire Chapter XVIII of the Cr. P. C. as it exists now is sought to be made inapplicable to such cases. But where the proceedings are not started on police report, in such criminal cases the normal procedure of enquiry under Chapter XVIII has been retained.

Why this blatant discrimination?

This procedure as proposed will arm the police with extraordinary powers and opportunities to get any person committed to the Court of Sessions, provided the Police can manipulate their records cleverly and effectively.

The authors of the Bill seem to be of opinion that as magistracy functions more or less mechanically in making commitments, no useful purpose is served by retaining the judicial pre-committal enquiry. Firstly, the proposition is basically wrong and the authors of the Bill seem to be out of touch with the present-day magistracy.

They are exercising often, the discretion vested in them of sifting, weighing and analysing

the evidence and in discharging the alleged accused in proper cases. Secondly, as a legal proposition also it is unsound, because as the law stands Magistrates have not been made mere recording machines and the magistracy of to-day is fully aware and conscious of their responsibilities.

Moreover, this is not the way in which maladies in the judicial system can be cured. If law is good, but it is not being properly operated and administered, improve the administration instead of derogating law into chaos. In my view the entire approach is wrong and perhaps this approach is the logical consequence of the mental set-up in which a group of our politicians, who are now in power, has put themselves in, by succeeding temporarily in achieving their objects by special legislations and ordinances. In the name of security and stability of the State during British occupation of India, our masters used to promulgate ordinances and special Acts eliminating normal procedure. In the preamble of most of such acts the object specified was—*speedy trial.* Our present day administrators have inherited that legacy and they have started legislating in that line. But Supreme Court, accepting the decision of the Calcutta High Court in certain cases, has laid down that since the adoption of the Constitution we cannot make discriminatory legislation on the excuse of speed.

While our Constitution guarantees equal protection of law, the Government entrusted with the task of protecting and nursing the newborn Constitution is seeking to introduce discriminatory procedure in our permanent statutes. For same offences, if proceedings start on a police report, there will be one procedure; but if a Magistrate takes cognisance of a private citizen's complaint the procedure will be different. If police wants a man to be hauled up before a Court of law and convicted, police must not be retarded by any procedural impediment. Therefore no judicial enquiry is needed at all when police decides to prosecute a man on a grave charge.

I can conceive of no greater danger to our hardwon freedom than this deliberate incursion on our *right to equal protection of law,* right to a fair trial and right to defend.

To illustrate how attempt is being made to deprive us of our *right to defend,* we may consider two other proposed amendments. By one amendment the right of cross examination of prosecution witness after framing of charge guaranteed by the present law is being eliminated! It is one of the most valued rights and to give the magistracy an option to refuse permission to all accused to cross-examine after framing of charge is really denying a fair trial. Cross examination before charge is often an impossibility and is very often not done as that gives an unscrupulous prosecutor an opportunity to improve his case as cross examination goes on.

Another illustration is the amendment proposing repeal of Sec. 162. By that section prosecution is debarred from using to its own advantage police records—records of statements of various persons taken by police in their Diaries. The reason and policy behind that salutory provision are obvious. A Police officer's record has no sanctity as he has powers to extort statements or manipulate desired statements. The said section is sought to be deleted, but why? The same policy is discernible here—to secure easy and quick conviction. But that should never be the objective of a welfare State; and it appears to me that we are drifting towards police regime and police is being invested with powers to completely control the judicial system of the country. While we are crying ourselves hoarse on the issue of separation of the judiciary and the executive with a view to ensure independence of the judiciary, to ensure free and fair trial, the Government is proposing to place the judiciary into perpetual bondage.

Furthermore a proposal has been mooted that even Sessions trials need not be held in the serene atmosphere of a Court.

Trials can be held at the locale of the occurrence. The proposal seems to be innocuous enough, but has dangerous implications. An accused facing a trial on the gravest charge in our penal law may have to face trial in a distant village, where naturally no legal assistance will be available and passions and prejudices will sway witnesses and local police will have the destiny of the accused in their hands.

The Bill introduced by a private member of the parliament, which also seems to have the blessing of the present party in power, seeks to abolish trial by Jury altogether. I know of no democratic and progressive country where trials by Jury have been abolished and it would be a libel on the nation to suggest that all men in this country are corrupt or that they always return perverse verdicts. In grave and serious offences, it is one of the basic privileges of a free people to be tried by their peers and if the adminitration is honest it is not difficult to evolve a method of selecting honest and upright people to sit as jurors.

We are unanimously of opinion that the case for retention of trial by jury is so overwhelming that we think it unnecessary to set out in detail the grounds for its retention.

High Courts in India have always functioned as the protectors of the people against executive highhandedness and oppression. Under our present Constitution powers of the High Court to protect fundamental liberties of the people have been maintained and in fact enlarged. Attempts had been made in the past and are being made now to curtail the powers of the High Court to function as a shield against injustice and oppression. Persons in power have hurled angry speeches in the legislature against High Courts when High Courts extended their protecting hands to people who had been unjustly and illegally deprived of their rights and liberties. We thought these were temporary outbursts likely to subside with passage of time. It seems we were mistaken. The present Bill is an indication that some people are moving with a design to subjugate the judiciary and make it subservient to the executive machinery. The power of the High Court which is essential to ensure a fair trial is sought to be taken away. While the Constitution has enlarged the powers of the High Court by Arts. 226 and 227 to safeguard the liberties of the people, the Government is seeking to curtail the powers of the High Court under the camouflage of speed and economy. This attempt must be resisted if we are keen to preserve our freedom.

Thus the Bill proposes—enlargement of the scope of summary trials, enlarging the power of Special Magistrates, giving greater power to lower grade Magistrates about imposition of sentences, giving power to Magistrates to virtually cross examine an accused at *any stage* of a trial, depriving an accused his right of cross examination in warrant procedure cases, abolition of pre-committal enquiry in Sessions triable cases started on police charge-sheet, vesting State Governments with power to have Sessions triable cases tried by Special Magistrates at their option. These are all symptoms of the same mental disease and we must not allow their cancer to grow and poison our body politic.

"If you 're strong on the facts and weak on the law, discuss the facts. If you're strong on the law and weak on the facts, discuss the law. If you're weak on the law and weak on the facts—bang the table."

FUNDAMENTAL RIGHTS IN A WELFARE STATE

By

PROFESSOR ASOKE SEN, M.A., LL.M.

At the present day the advent of the Welfare State is hailed by many; at the same time the problem of how to preserve our fundamental rights is a burning one in India. But here Professor Sen has argued with extreme force and conviction that "there is scarcely any scope for fundamental rights in a welfare state, so that cry for a welfare state, and insistence upon fundamental rights go ill together"—[Editor]

The framers of the constitution of India have thought it fit to declare the fundamental rights of the citizen, and since the inauguration of the constitution there has been much controversy in the press as well as on the platform as to whether the protection afforded to such rights is adequate. This controversy is one of the live issues of the day and there is scarcely any agreement on this point among the different political parties of our country. During British rule the discussion about such rights was more or less academic in nature.

Part III of the Constitution enumerates the various fundamental rights guaranteed by the constitution. Such enumeration has been acclaimed as a step in the right direction by a vast majority, but there are critics who doubt the wisdom of incorporating them in the constitution. They cite the example of Great Britain where, in the eye of law, there is no distinction between such rights and other rights and where such rights are primarily based upon the common law. There a man can say whatever he likes unless he brings himself within the mischief of the law of libel or sedition; and he is free to associate with anyone he likes for a purpose which is lawful. As a matter of fact an Englishman perhaps enjoys much greater liberty than the citizen of a country where the fundamental rights are guaranteed by the constitution.

On the other hand those who are in favour of such rights being guaranteed by the constitution argue that in a country where the tradition of liberty has not taken deep root, such rights are apt to be ignored or forgotten unless they are incorporated in the constitution. Being made a part of the constitution, they receive proper attention and in course of time they are woven into the political tradition of the country.

The idea that certain rights are more fundamental than others was vigorously canvassed by political thinkers like Locke or Rousseau, and if we remember the political condition of England and France at the material times, it must be admitted that they were perfectly justified in emphasising this distinction. They argued that the state was entitled to the obedience of the citizen only when it guaranteed the rights that were fundamental, because, in their opinion the state primarily existed for the protection of those rights. Hobbes, however denied the existence of any such rights. According to him, as the King was not a party to the social contract that preceded the formation of the state he owed no duty to the citizens; and the citizens having agreed by the contract to obey the king had no right to disobey him.

The framers of the American Constitution were greatly influenced by the revolutionary ideals of Rousseau and Locke, and they in framing the constitution made a declaration of the fundamental rights. There was also historical justification for doing so. The Americans having freed themselves from the bondage of British rule naturally felt nervous about their liberty in future; consequently they made special provision in their constitution for

the protection of the various liberties of the individual.

For similar reasons the framers of the constitution of India felt the necessity of declaring the fundamental rights. The Indians too were a victim of foreign rule for a long time, and they attained their liberty after a long and bitter struggle. They enjoyed very little liberty and all their rights were at the mercy of the foreign rulers. To guard against the recurrence of such interference with the liberty of the individual the framers of the constitution of India followed the example of America in making the fundamental rights a part of the constitution.

These rights are primarily associated with the liberty of the individual. Liberty however is not merely a negative concept. It means much more than absence of control; it has a positive content too. A man in order to realise his best self must have some rights, that is, capacity recognised by the state to do certain things; and the sum total of those rights constitute his liberty. New rights have been recognised from time to time and some of the old rights have become obsolete. For instance right to property in modern times is under a serious challenge, whereas right to work, right to education, right to employment etc. are clamouring for recognition.

But there are certain rights which seem to be inseparably bound up with the liberty of the individual, for example, right to express opinion freely, right to associate with others, right to move about freely, right to hold property, right to carry on any business or profession; and these are the rights usually known as the fundamental rights of the individuals. Right to life, right to liberty and right to property were regarded by Locke as the primary requirements of human existence, and the modern freedoms are the variations of these rights.

The struggle for fundamental rights can be traced to the tyranny of the monarch. The Great charter contained the rights that during the reign of King John were regarded as fundamental, and the King was forced to give his assent to the said charter. During the French Revolution the people of France clamoured for equality, liberty and fraternity, because they were conspicuous by their absence. It is the tyranny of the monarch that induced the common people to clamour for certain rights which they regarded as essential to their social existence.

The fear of executive tyranny lingered in the minds of the people even after the advent of democracy. Hence the framers of the American constitution incorporated the rights that were regarded by them as fundamental in the constitution of America. Besides, the Americans towards the end of the eighteenth century were terribly afraid of dictatorship and they thought that if the fundamental rights were guaranteed by the constitution it would be impossible for dictatorship to raise its heads. The American model has in subsequent years been followed by many other countries.

People cry for fundamental rights in their anxiety to preserve political liberty. Throughout the nineteenth century the state was a suspect; very few were in favour of giving large powers to the state. It was thought that power would intoxicate the state and the liberty of the individual would be circumscribed.

But in the twentieth century, with the spread of socialism people look upon the state as a welfare organisation. The state is not, it is argued, merely a machinery for preserving law and order and protecting the country from foreign aggression; it is also capable of doing immense good to the community. The present tendency is to enlarge the sphere of the state. The state being such a powerful organisation, why should it not be utilised for promoting social welfare?

What is the effect of such change of attitude towards the role of the state? The present tendency is to ask the state to take up more and more activities for the good of the community. In other words, now-a-days the state is regarded not so much as an organisation for exercising authority as an organisation for promoting welfare. The police state has been replaced by the welfare state. The state is not so much feared as loved.

What is the scope for fundamental rights in a welfare state? We insist upon right to freedom, right to equality, right to property

and other fundamental rights only when we think that the state is out to destroy them and that the state is a necessary evil which is to be tolerated rather than welcomed. But if we look upon the state as our saviour, if we think that our progress, property and happiness are entirely dependent upon the activities of the state, there is no point in laying emphasis upon our fundamental rights. Our object is to demonstrate that there is scarcely any scope for fundamental rights in a welfare state.

In modern concept the duty of the state is to promote the welfare of the public. Now, it is a matter of common knowledge that interest of the individual in many cases may be in conflict with the interest of the community; and that an individual in the name of asserting his rights may in fact be furthering his self-interest at the sacrifice of social good. For instance, Government wants to acquire a plot of land in the heart of the city for the establishment of a hospital. From the social point of view land should be acquired at the minimum price, but the owner of the land will try to realise as high a price as possible from the Government. In a case like this the welfare state may think it desirable to ignore the right of the individual with a view to promoting the interest of the community. When the state thinks that the prosperity of a backward country depends upon industrialisation, it may be necessary to gag the voice of those who decry industrialisation. The state may feel that without abolishing private property, it is impossible to utilise to the best possible advantage of the community, the material resources of the country. In that case right to property, one of the fundamental rights, is likely to be ignored. A true welfare state, having the good of the country at heart, can never allow private right to stand in the way of social welfare and progress. Again, to prevent congestion in a big city it may be thought desirable to prevent people residing in the country side from flocking into the city and that means curtailing the freedom of movement. To prevent over-production in an industry it may be necessary to limit the number of firms; in other words the right to carry on or engage in a particular trade or profession may be severely curtailed. With a view to step up production in an area which is scarcely populated it may be necessary to conscript labour; and when a man is made to work against his wishes, he is no better than a slave.

In short, a welfare state can go to any length for the purpose of promoting the welfare of the people. If the state is conceived as a machinery for promoting welfare it must be given a free hand in doing things for which it has been created. Our demand from a welfare state knows no bound. It is expected that the state should look after the health of the expectant mothers, should take charge of the babies after they are born, should provide milk and food for their proper nourishment, should maintain nursery schools for their early training, should maintain institutions for primary and secondary education, should provide facilities for technical education, should find out employment for the adults, should look after the invalid and the old, should establish and maintain hospitals for proper treatment of the sick, should look after public health, in short, should do everything in which an individual is interested from birth till death. We also look to the state for the promotion of culture, advancement of learning and encouragement of literatures, poetry, painting, music and other fine arts. We no longer rely on individual effort; we are unwilling to take a single step forward unless the state comes to our aid. We have, in our infatuation for the welfare state, lost confidence in ourselves. We pray to the state: "Lead us kindly light". We feel helpless unless we are assured of state aid, just as a baby feels helpless when the mother is away. We seek to justify this pathetic faith in the state by saying that the character of the state has changed; that the police state has been replaced by the welfare state.

When we expect so much from the state, when we feel helpless without state aid, when we are powerless to do anything unless the initiative is taken by the state is it possible for us to assert our rights against the State? Fundamental rights are claimed by one who wants to be left alone, who is intolerant of any interference whether by the state or by any other authority, who has confidence in himself and who looks upon the state as a necessary evil. He thinks that without these rights he will not be able to realise his best self and attain his full stature. He has confidence in

himself, he believes in self help, he does not look to the state to overcome difficulties and he wants to reserve for himself as large a sphere of activity as possible. He is afraid of allowing the state to increase its sphere of action, lest the state should become too powerful. To him fundamental rights are indispensable. He wants all round freedom to contribute to the welfare of the community. A stubborn individualist like him started the movement for fundamental rights and progress of the movement is inseparably connected with the progress of individualism.

But a modern citizen has lost faith in individualism, he has lost faith in himself; in his anxiety to enjoy material comforts he is willing to become a bond-slave of the state. He deludes himself into thinking that the state can increase the standard of comforts overnight as as if by magic. When he expects so much from the state, he cannot certainly complain that the state has become too powerful. The state requires power in order to discharge the duties entrusted to it. The state can claim absolute power if you are absolutely dependent upon it even for the daily needs of life.

Hence, in a welfare state it is impossible for the citizen to assert his rights including fundamental rights against the state. He is entirely dependent upon the state for all the requirements of life. His food, clothing and shelter are provided by the state, he gets his education in one of the institutions established and maintained by the state; he earns his livelihood by working in a government office, or a government factory, or in a government farm, or in a government store; or he may be a member of the defence force. A free citizen impatient of state control will become a thing of the past. He will cling to the state just as a baby clings to its mother. If he is employed by the state, if he thinks he is unable to find out any occupation for his maintenance unless one is provided him by the state, he will be an employee of the state. And as an employee of the state it will be extremely difficult for him to do or ask for anything against the wishes of the state. When his salvation lies in abjectly surrendering to the state, it is impossible for him to clamour for fundamental rights against the state.

It is therefore submitted that there is very little scope for fundamental rights in a welfare state. When everything is to be done by the state it is in the fitness of things that the state should have the powers to regulate all our activities. The state may very well say, "unless you obey me implicitly, I shall not be able to bring in the millenium". Now-a-days we are thinking not in terms of the rights of the individual but in terms of the services to be rendered by the State. And the state will not be able to render those services unless maximum power is transferred to the State. So in an ideal welfare state, or in the language of Roscoe Pound, Service State, there is scarely any scope for fundamental rights. A cry for a welfare state, and insistence upon fundamental rights go ill together; the former will ultimately destroy the latter. It may, however, be argued that in a true welfare state there is no necessity for fundamental rights, but that is altogether a different proposition.

The welfare of the people, or of the public, is Supreme Law. (13 *Co.* 139)

SYMPHONY IN JUSTICE

By

PROFESSOR S. A. MASUD, M.A., LL.B., BARRISTER-AT-LAW.

The Independence has come, the Millenium will also come if we let Justice prevail. Let the presiding deity of Justice sing her heavenly Muse and infuse our air with her sweet music, let justice be done in all spheres—social, economic and political, and above all let men be Just, and this fair and ancient land of ours will become the Heaven on earth....So says Professor Masud.—[Editor]

A free nation is born in India to herald joy and Happiness to the frustrated and agonised souls. Independence, like the Messiah, has ushered in a message of hope and peace to the millions and millions of people in India who had been living and are still dragging on their accursed existence like sub-human beings. The Millennium can come and will come if the Nation is baptised in the holy water of the Universal values—values which cannot be bound down to topographical limits or racial or religious compartments. The crucifixion can be avoided if these universal values—the principles of old *Jus Naturalis*—constitute the substratum of administrative and Judicial fabric. If, on the other hand, the politicians give a go-by to statesmanship and out of impetuous enthusiasm and impulsive acts deviate themselves from the all-embracing road to truth and justice and demonstrate their narrow sense of patriotism with a gusto of pseudo-chivalry, posterity will show that the hands of the clock were put back, if not made completely immobile and static.

Justice is one of the universal values which should unfold all its grandeour and lustre, revitalise the nation and raise humanity to its full stature. A country justly administered is a country worth living in—the only concrete heaven in earth. A modern man is not objectively interested in Utopian heaven or Heaven as sanctioned by religion or pictured by mythology. He would live and die with determination and courage not only for his individual progress but also for the progress of the society and the nation. But this progress is impossible to achieve, if a country is not ruled with justice. The legislators, administrators and the executives must discharge their responsibilities of eradicating social evils, inequities and introduce economic self-sufficiency of all men and women. Further, the officials in their judicial or quasi-judicial capacity must without fear or favour, affection or ill-will decide individual disputes and grievances more in accordance with the spirit than with the letter of the law of the land. The orthodox views of course, is to interpret laws on the basis of established principles and precedents and apply them to the facts as adduced by evidence. But this is only half-way to reach the ideal of justice. The courts are the only bulwark against the liberty and well-being of the subject in respect of individual, social and departmental aggression. The courts will certainly administer justice, but their greater responsibilities lie in doing or reaching justice to the litigants who need justice. The golden rules of interpretation cease to be golden if the judges conscientiously feel that they are bound by age-old precedents, static substantive law and arctiaic procedural law. Hard facts, of course, do not make bad laws; nor the judges can usurp the functions of legislators; but judicial decisions are legal fictions by which new laws, new principles could be evolved through "Interpretations". It is through this medium of "Interpretations" that a judge has the scope of doing full justice. Ordinarily, positive laws are man-made and the man who makes it belongs to one group of human society, namely

the privileged and the prosperous group, and the judges are enjoined to interpret these very laws which are the reflections of a small minority of the people. As Henry Maine puts it "Law is stable but society is progressive". Law must respond to the pulse of the society as a whole—a society consisting of the Rich and the Poor. The shrieks and agonies of millions of people, the results of fortuitous concourse of social maladjustments cry in the street but nobody hears it. The judges without changing the framework of the out-moded laws can through the medium of "Interpretations" hear the dumb and mute voice of these cruel victims of society and can render justice to them as much as it is possible for them to do. Similarly, justice can be made complete if the judges exercise their "Discretion" according to the needs and requirement of the people as a whole. Mr. B. J. Cardajo has thoughtfully stated in his famous work "The Nature of the Judicial Process," "My duty as a judge may be to objectify in law not my own aspirations and convictions and philosophies but the aspirations and convictions and philosophies of men, women of my time. Hardly shall I do this if my own sympathies and beliefs and passionate devotions are with a time that is past".

The song and symphony of justice can permeate and infuse the air if disharmony in the administration of justice is set aright and harmony restored to the social, political and judicial anachronism. The legislators must legislate for the economic welfare of the people. The appalling economic disparity must be bridged so that social justice is reached to all men, women and children. The executive must develop a judicial mind to avert administrative lawlessness in the exercise of their quasi-judicial functions. The formal judiciary or the modern Administrative Tribunals must not only make justice easy and inexpensive, but quickly available. Public opinion and Press have got to be alert, active and vigilant. Above all, individual character and integrity of judges and jurors, lawyers and litigants must reach a standard by which not only people should develop love and respect for law but also should learn and benefit from each other. The rift in the lute will disappear, the music will flow and justice will blossom forth all its hallowed glory and fragrance and embalm the nation with Peace and Happiness.

Though authority, established for the ends of justice, may lift itself up against it;—though every species of art should be employed to entangle the opinions of the people; yet all this will not pluck a hair from the head of innocence; the Jury will still look steadfastly to the law, as the great polar star, to direct them in their course:—as prudent men they will set no example of disorder, nor pronounce a verdict of censure on authority, or of approbation or disapprobation beyond their judicial province:—but, on the other hand, they will make no political sacrifice, but deliver a plain honest man from the toils of injustice.—When their verdict is pronounced, this will be the judgment of the World; they will say—We have yet a sheet anchor remaining to hold the vessel of the state amidst contending storms:—we have still, thank God, a sound administration of justice secured to us, in the independence of the Judges, in the rights of enlightened Juries and in the integrity of the Bar;—ready at all times, and upon every possible occasion, whatever may be the consequences to themselves, to stand forward in the defence of the meanest man when brought for judgment before the laws of the country.

Lord Erskine.

HOW FUNDAMENTAL ARE OUR FUNDAMENTAL RIGHTS

By

SRI SADHAN CHANDRA GUPTA, M.A., LL.B., BARRISTER-AT-LAW, M.P.

(*Ex-student*)

The fundamental rights guaranteed in our Constitution are the most treasured possession of the Indian people. But the onslaughts to which they may be subjected may come from diverse directions. In this article Mr. Gupta seeks to make us aware of these threats to our fundamental rights so that we may safeguard them all the better.—[Editor]

How fundamental are our fundamental rights? Are our fundamental rights respected as they should be or do they suffer from any threat? These are questions which concern a lawyer and a jurist no less than a politician. The politician's concern is about what interests threaten the fundamental rights, why they threaten them and how to fight back the threat. The lawyer and the jurist as such are concerned only with what legislative, administrative or other devices are employed to set our fundamental rights at nought. This article deals with the question from the lawyer's and the jurist's point of view.

Fundamental rights do not become fundamental merely by reason of their recognition by the constitution or law of a country. Their fundamental character is based more on the special sanctity attached to them by the conscience of civilised society than on the recognition given them by the legislature. It is no doubt customary for written constitutions to constitute certain rights as "Fundamental", but fundamental rights can and do exist even outside those constitutions.

In our country certain rights are described in Part III of the Constitution as fundamental rights. For example, rights of equality before the law and equal protection of the laws (*Art.* 14), right not to be discriminated against on grounds of religion, race, caste, sex, place of birth or any of them (*Art.* 15), equality of opportunity in matters of public employment (*Art.* 16), freedom of speech and expression, rights to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to carry on any trade, business, profession or occupation etc. (Art. 19). There are yet other rights, recognised by Part IV of our Constitution as "Directive Principles of State policy" which are no less fundamental, though they have been made unenforceable. Such, for instance, are the rights of all citizens to an adequate means of livelihood and to equal pay for equal work (*Art.* 39), rights to work and education and to public assistance in case of unemployment (*Art.* 41), right to a living wage (*Art.* 43), etc. Besides, even outside the constitution there are certain rights which are no less fundamental. For example, the right to strike is a very important fundamental right and although not expressly recognised by any law as such, it has been vindicated by the Labour Appellate Tribunal (1952 Labour Appeal Cases 490). Similarly freedom from arbitrary arrest or detention, though not recognised in that form by the constitution, is no doubt one of our fundamental rights. In a word, those of our rights which are regarded as peculiarly sacred and which cannot be violated without outraging society are our fundamental rights, whether their special sanctity is or is not recognised by the constitution or any other law.

Are fundamental rights in our country respected as they should be? The answer is an emphatic "No". In our country fundamental rights have always suffered from severe attacks and the attacks are severest today.

These attacks are direct as well as indirect. Direct attacks take the form either of violation of the fundamental rights or, which is more usual, of open suppression of these rights.

We have only to mention a few of our fundamental rights to understand the magnitude of their violation. The constitution provides: "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which Justice, social, economic and political, shall inform all the institutions of the national life" (*Art.* 38). "The state shall, in particular direct its policy towards securing—(a) that the citizens, men and women equally, have the right to adequate means of livelihood; (b) that the ownership and control of the material resources of the community are distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; ....." (*Art.* 39). "The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age sickness and disablement, and in other cases of undeserved want (*Art.* 41).

The state shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, "and in particular, the state shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas" (*Art.* 43). "The state shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties ....." (Art. 47).

Now inspite of words like "strive", "endeavour", "within the limits of its economic capacity & development", is not our every day experience a mockery of these provisions? Can we really say that the state is "striving", "endeavouring" or doing "within the limits of its economic capacity and development" what it has been enjoined to do.

It may be objected on the strength of Art. 37 that these injunctions are not binding. But that is far from correct. No doubt it is very tempting to take shelter behind the words of Art. 37 that "the provisions contained in this part shall not be enforceable by any court", but that does not mean that the provisions are not binding. The words in the same Art. which immediately follow leave no room for doubt that the provisions are no less binding although they may not be enforced by any of law. These words are: "but the principles therein laid down are nevertheless fundamental in the Governance of the country and it shall be the duty of the state to apply these principles in making laws".

It is clear from this that any authority that refuses to apply these principles and still more any authority that acts contrary to them is guilty of violation of the fundamental rights conferred on us by the constitution. Thus retrenchments, increase of tution fees, wage cuts, closing down of schools, to take a few random illustrations—are flagrant violations of our fundamental rights.

Unenforceable rights however are not the only rights to have been violated. Fundamental rights guaranteed by the constitution as well as fundamental rights outside the constitution have come in for their share of attacks. Many detention orders for instance have been set aside by the High Courts and the Supreme Court on the ground that fundamental rights of the detenue to receive grounds within a reasonable time have been violated or because the grounds given were so vague that they could be said to be no grounds at all.

In Gopalan's case (1950 *Supreme Court Report* 27) an attempt was actually made to circumvent the rights to move the High Court and the Supreme Court for a writ of *Habeas Corpus* by forbidding on pain of imprisonment the disclosure of the ground of detention.

The most prevalent form of direct attack is open supercession of the fundamental rights either by legislation or by administrative actions. The right to freedom from arbitrary arrest and detention is contravened by such laws as the

Preventive Detention Act. The right to move freely throughout the territory of India and to reside or settle anywhere therein is suppressed by the provisions regarding externment and internment in the Security Acts in force in different states. Sec. 144 of the Criminal Procedure Code is frequently resorted to for suppressing the right of public meeting, while the right to strike has been seriously encroached upon by the Industrial Disputes Act (Appellate Tribunal Act), which prohibits any strike whatever during pendency of conciliation proceedings or reference before an Industrial Tribunal or of an appeal before the Labour Appellate Tribunal.

Direct attacks do not, however, always prove practicable or advisable. They sometimes evoke an inconvinently high degree of public resentment and, therefore, unless the situation becomes too desperate for those interested in suppressing the fundamental rights or unless popular organisation or public opinion is too weak to resist contravention or suppression of fundamental rights, indirect attacks are resorted to as the most convenient method of suppressing these rights. Therefore, the most serious and pernicious threat to the fundamental rights in our country as in most other countries comes from indirect attacks.

The *modus operandi* in indirect attacks is to suppress not the rights themselves but their exercise. The rights themselves are left untouched but their exercise is sought to be prevented by dangling a threat of undesirable consequences if they are exercised.

The forms which indirect attacks may take are limited only by the limits of vicious human ingenuity, but we need notice only some of the common methods prevailing in this country. These are deprivation of jobs, hooliganism, preventive proceedings under the Criminal Procedure Code and false prosecution.

In Government as well as many private establishments it is perilously risky to be an active trade unionist. Though there is no bar in either case to forming trade unions, an active trade unionist in a Government and in many private establishments runs the risk of being victimised. Victimisation implies that the victim is purported to be penalised not on account of trade union activities but on some other pretexts, the object being either to get rid of him thereby or at best to frighten him away from his trade union activities. Many trade unionists in the Railways, Post & Telegraphs and other departments of the Central and the State Governments as well as in many factories and offices have been discharged on pretexts of unreliability, inefficiency, indiscipline and so on in order to check their trade union activities.

A trade unionist's trouble does not end with the loss of one job. An active trade unionist always has the attention of the police and through their good offices he is likely to be found out wherever he is able to secure a job—and who would not chuck out an active trade unionist?

The resort to hooliganism as a means of suppression of the fundamental rights, particularly for suppressing the working class and peasant organisations and the right of the working class and peasantry to bargain on the basis of their demand is too notorious to require detailed treatment. It is well known how employers or landlords frequently engage hired hooligans with a view to break up workers' and peasants' organisations by beating up their adherents or by threatening them with grave physical danger.

A notorious device, which is very effectively employed to suppress mass organisations usually of workers and peasants is the institution of preventive proceedings, under the code of Criminal Procedure. It is most usual to resort to section 107 of that code. Sub-section of that section provides: "Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or a Magistrate of the First Class is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity the magistrate, if in his opinion there is sufficient ground for proceeding, may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without surities for keeping the peace for such period not exceeding one year as the magistrate thinks fit to fix.

The *"manner here-in-after provided"* involves along drawnout enquiry often lasting a year or more, in course of which numerous witnesses are usually examined on either side. As the victims of these proceedings are usually trade

unionists or peasant leaders or organisers, it means an expense entirely beyond their means. To crown all, the engineers of these proceedings are often able to secure adverse police reports and on the strength of these manage to induce the magistrate to order the victim to furnish interim bond to keep the peace. Such an order means that the victim has either to find a sum of money which for men of his economic position involves unbearable strain on financial resources, or, if he is unable to secure the required amount of money, he has to rot in jail till the conclusion of the proceedings in his favour. These proceedings in most cases end in favour of the victim as false proceedings usually must, but in the process the victim is financially ruined and may be completely demoralised by the harassment and expense involved. Thus the object of these proceedings is not to bind down the victim to keep the peace—for he has never contemplated committing any breach of peace—but to scare him away from leading, organising or participating in the activities of any trade union or other mass organisation by holding out the threat of further harassment and expense.

If these means do not prove too successful, false prosecutions are resorted to in order to prevent the exercise of fundamental rights. This method is very common in peasant areas but is by no means rare in other fields. Two devices are employed for launching false prosecutions, namely concoction of false cases against the victim and falsely prosecuting the victim of crimes actually committed by others.

The first device is the most common. Under this method the victim is arrested and a false case is concocted against him. He is kept as an 'undertrial' often for years and has either to rot in jail or to get an expensive bail, and in the later case, has to suffer further harassment and expense by being compelled to attend Court every fortnight, some times from a distance of upto 100 miles. Usually no charge sheet is submitted against him at the end and he is discharged. Even when a charge sheet is actually submitted the case usually ends in aquittal. In either case the victim is financially finished.

The second device—that of falsely implicating the victim in cases of crimes actually committed by others—is resorted to where crimes are common. The method in this case is not to concoct a false case against the victim but to seize upon a true case of commission of a crime and to send up the victim, usually along with some of the actual criminals on the false charge that he too has committed the crime. This device is a very pernicious one because it is extremely easy to get a conviction in such cases through false witnesses who speak the truth about the occurrence itself but falsely identify the victim as being concerned in it. It is by no means difficult for the police to secure such witnesses. But it is very difficult to expose through cross-examination this kind of witness, unlike the witness whose testimony is false from beginning to end, as the only thing such a witness has to do in giving an impression of being truthful is to stick to his false identification. In this way even convictions may be secured, and in any case the victim is put to great jeopardy in respect of both his liberty and his financial resources.

Thus the conclusion clearly follows that our fundamental rights by no means enjoy that security and respect which we might usually expect them to enjoy. Their violation is by no means an exceptional phenomenon and all kinds of devices—both of direct suppression and indirect subversion—are employed to set them at nought. The situation is such that we can hardly look upon it with equanimity. What, then, should be done? That is a question which has to be answered as much by the politician as by the lawyer and the jurist.

RAMAYANA AND THE MODERN LAWS

By

SRI. B. C. SEN, M.A., LL.B.

(*Ex-student*)

In the following article the author has endeavoured to show how some of the incidents of the RAMAYANA—the great Epic of India, can be explained with the help of modern criminal law. The article deals mainly with criminal law. Reason may be that in the archaic days the penal laws were more extensive in nature.—[Editor]

The story of the Ramayana is a household word throughout the length and breadth of India. The principal incident is the abduction of Sita by Ravana and her rescue. A careful study of the story will reveal that, among other provisions of modern law, some of the important provisions of the Indian Criminal Procedure Code were resorted to. It is indeed a matter for reflection on the part of those jurists, who claim that the modern laws are the result of modern civilisation and owe nothing to the past. To the unbiased student it will be evident that similar provisions did exist in the days of the Ramayana.

After the marriage between Rama and Sita, King Dasaratha was forced by circumstances to direct the banishment or exile of the heir-apparent to the throne. Rama had no alternative but to obey the commands of his father and undertake a sojourn into the wilderness. His newly-wed consort, Sita, still a minor, displayed great ultra-modern tendencies and declared that she must have her honeymoon in the company of her husband, who was to go out on, what she considered to be, a "hunting expedition." There was no power in the Royal household to resist her demand and she did go.

In the course of their travels, the most unfortunate incident happened. She was forcibly abducted by Ravana. At first Rama felt bewildered, but uitimately he came and applied to King Sugriva. In those days, the powers of the courts were being exercised, not by Magistrates and Judges, but by the King himself. There was some difficulty in Sugriva exercising jurisdiction because Bali, and not Sugriva, was actually on the throne. Rama having been apprised of the difficulty, assisted in Sugriva being installed as the King and being vested with the full powers of the King. Having been installed on the throne, the first application which the King disposed of, was one under provisions of their law corresponding to Section 552 of the modern Criminal Procedure Code, Act V of 1898, which runs as follows :

> "**552—Power to compel restoration of abducted females**—Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of eighteen years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and **may compel compliance with such order, using such force as may be necessary.**"

Mark the words at the end of the section. This includes the power to employ armed forces for the purpose of compelling compliance with the order.

King Sugriva issued the order, as all the requirements of this section had been satisfied, namely (1) the age of Sita, (2) her abduction, (3) her unlawful detention, and (4) such detention being for an unlawful purpose. Anyone conversant with the story of Ramayana knows

—that, from the very beginning, Ravana's intention was to marry Sita, who was already a married woman, against her will.

Not having been satisfied with issuing that order, the King also issued a warrant, similar to that provided for by Secton 100 of the Code of Criminal Procedure, which runs as follows :

> "100—**Search for persons wrongfully confined**—If any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."

It must be noted here that in this matter as well, it was the King, who was functioning, and not any Magistrate. This warrant was of extra-territorial operation and provisions similar to those of Section 84 of the Criminal Procedure and Section 55 of the Civil Procedure Codes were used.

> "84—**Warrant directed to police-officer for execution outside jurisdiction**—(1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed."
>
> "(2) Such Magistrate or police-officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed, to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant."

This is why the assistance of Bivisana had to be taken.

> "(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer, within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the court which issued it."

Therefore, even without the assistance of Bivisana, Sugriva and his officers were entitled to take action within the territories of Lanka.

The application of provisions, similar to Sections 47 and 48 of the Code of Criminal Procedure and section 55 of the Code of Civil Procedure (Act V of 1908), regarding entry into premises by breaking open door, is also noticeable throughout the action taken for the rescue of Sita. Above all, the provisions of Section 105, which runs as follows:—

> "**105—Magistrate may direct search in his presence**—Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant."

were complied with inasmuch as Sugriva himself was present throughout the operations. The presence of Rama was necessary for the purposes of identification. Laksmana had to attend as a search witness and also for affording independent evidence of corroboration. The necessity of respectable search witnesses and independent corroboration is also not a new legal conception. For this purpose, the selection of Laksmana, a Prince of the Royal blood, was unimpeachable.

Another set of modern provisions, which were applied, is to be found in Chapter IX namely, the dispersal of unlawful assemblies. The expression "*unlawful assembly*" is defined in the Indian Penal Code, (Act XLV of 1860) Section 141, which reads as follows:—

> "An assembly of five or more persons is designated an unlawful assembly, if the common object of the persons composing that assembly is, First, to overawe by criminal force, or show of criminal force .....any public servant in the exercise of the lawful power of such public servant....."

The officers of King Sugriva, who went out in the quest of restoration of Sita, very much like the quest of the "Holy Grail", were undoubtedly all public servants, as defined in section

21 of the Indian Penal Code. Ravana's followers were undoubtedly more than five in number and they came out with the common object of overawing, by criminal force, the public servants employed by the King Sugriva. The action of the followers of Ravana constituted them an unlawful assembly and they had to be dispersed by the use of military force. When their activities, both by land and air, took a threatening turn and caused a reasonable apprehension of death to the officers of King Sugriva, Section 106 of the Indian Penal Code came into operation, which runs as follows:—

> **"106—Right of private defence against deadly assault when there is risk of harm to innocent person**—If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk or harm to an innocent person, his right of private defence extends to the running of that risk".

Illustration

> "A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children."

This being the position of Ravana, he being the offender, namely the person guilty of abduction of Sita and also her concealment with the knowledge that she had been abducted and detained for an unlawful purpose, he could not claim any right of private defence and had to submit to the process of law and lawful orders passed by the King Sugriva.

The first emissary of Sugriva, who landed within the territories of Lanka, was Hanumana. He was wrongfully confined. Attempts were also made to cause his death by fire. In trying to extinguish that fire, he had, frantically, to jump about waving his burning tail, with the result that a portion of Ravana's favourite orchard was set ablaze. Here we find that no liability for arson would attach to Hanumana. The same set of rules regarding the protection of persons or property apply even today to the English Law of Torts. The case of *Scot—Vs*—Shepherd, commonly known as the Lighted Squib Case may be cited as an illustration. [(1773) 2 Wm. Bl. 892].

Even the then functioning U.N.O. was not prepared to afford any protection to Ravana, because he had no equities to cite in his favour. The maxim "Who seeks equity must do equity" and "He who comes to equity must come with clean hands" were also recognised in those days. All the equities were against him, none in his favour. His hands were not clean.

This anecdote, in a nut-shell, demonstrates that the principles of the Indian Penal Code and Indian Criminal Procedure Code and the Rules of Tort and Equity were not unknown in the days of the Ramayana and ought to convince our modern jurists and legislators that modern world is in no way independent of India's ancient culture, but is really a follower of that culture.

However the law, to make it a mystery and a trade, may be wrapped up in terms of art, yet it is founded on reason and obvious to commonsense.

Buckinghson

DEMOCRATIC LAWYERS' MOVEMENT

By

SRI A. P. CHATTERJEE

Secretary, West Bengal Democratic Lawyers' Association

The West Bengal Democratic Lawyers' Association is of recent origin. In the following pages, Mr. Chatterjee, the Secretary of the aforesaid association, enumerates, in brief, the aims and objects of the movement of Democratic Lawyers.—[Editor]

'Democratic Lawyer' is not a strange term in Bengal. Throughout the period of anti-British struggle the lawyers of Bengal have always played a glorious part. It is in this glorious tradition that the Democratic Lawyers' movement has to be conceived. Now the Congress has taken over the government of the country. This fact has led to a slackening of the watch by the lawyers. We have become oblivious of our duty as sentinels of liberty.

But our duty to preserve liberty has become the more onerous in as much as the present regime seeks to extend police powers. Mention may be made of the Preventive Detention Act. Under this Act, whenever the Government is satisfied that a person ought to be detained for the purpose of security of the state or for maintenance of public order, it can pass an order for his detention. Such order is not liable to be tested in any Court. The District Magistrates, Additional District Magistrates, the Commissioners of Police for Bombay, Calcutta, Madars and Collectors in the state of Hyderabad are also given the above power.

Again recently a liberal use is being made by the Executive of Civil Service (safeguarding of National security) Rules. Under these Rules, a Government servant, if he is suspected of being engaged in any subversive activity, will be compulsorily retired from service. We have seen many applications of these Rules in the recent past and countless people serving in Government establishments and Railways have lost their jobs because departmental heads suspected them of having been engaged in subversive activity. There is a certain procedure prescribed for action under these Rules and if that procedure is followed the courts cannot interfere even though there may have been great injustice committed in substance.

We may also refer to the preventive sections of the Criminal Procedure Code. Students of law know that there is a dangerous group of sections in the Code, namely from sections 107 to 110, which empower the Magistrate to require any person, whom he suspects to be about to break the peace, or who is represented as otherwise undesirable, to enter into a bond for keeping the peace or good behaviour. Unless the suspect provides satisfactory sureties for such bonds, the Magistrate concerned may have him clapped in jail. There is an appeal from the Magistrate's rejection of such sureties but the disposal of the appeal will take at least a month, if not more. In the meantime the suspect will be rotting in Jail. Whenever any mass protest action against injustice or tyranny develops, we have seen the Magistrates detaining persons without trial under the foregoing sections of Criminal Procedure Code. The purpose is to stultify mass action by arresting the leaders. Democratic Lawyers' Movement is directed against such abuse of process of the court and against exercise of Police powers by the state.

A further purpose of the Democratic Lawyers' Movement is to organise the lawyers on a democratic basis. We are ashamed to note the gradual deterioration of the moral fibre of Lawyers as a class. Gone are the days of Rashbehari Ghose and Sarat Bose when the Bar used to be respected by the judges and the

Magistrates. Nowadays even Puisre judical officers do not hesitate to crack jokes at the Bar or even insult it. The Bench dares to be disrespectful to the Bar because the lawyers are not organised firmly on the basis of democratic principles.

We know, however, how organisation can be effective in securing the proper respect and regard from the Bench. I refer only to a single instance. It was a Magistrate at Krishnagar who insulted a Senior Lawyer of Krishnagar Bar. The whole Bar boycotted the Court of the Magistrate for three days. Ultimately the Magistrate had to be transferred. Organised action always bears fruit.

For raising the dignity of the Bar, for securing respect for the Bar, for strengthening the moral spirit of the lawyers as a class, Democratic Lawyers' Movement is necessary.

Democratic Lawyers' Movement will re-establish the contact of the lawyers with the struggling people—the people who are fighting for food, cloth, shelter and a higher standard of living. We have indicated above how in times of developing mass action, people are harassed, arrested, detained by the Police. In such times, people are in bad need of legal help. It has been the proud tradition of the Bar to come forward to help the people in such contingencies. But so far, the help has always been un-organised. It is one of the aims of democratic lawyers' movement to organise the assistance of lawyers when such contingencies arise for helping prisoners arrested in course of mass arrests by the police.

Democratic Lawyers' Movement further seeks to establish contact of the lawyers with International Democratic Lawyers who are also in their own way striving to maintain the rule of law in their lands and resisting the extension of police powers. We will learn from the experience of Democratic Lawyers in other parts of the world how to establish and maintain democracy on our soil.

Last but not the least, the aim of Democratic Lawyers' Movement should be to widen the horizon of knowledge. It is said to note that present-day lawyers confine themselves to reported decisions and never look beyond the section of the law which they have to interpret. Basic principles of law are consequently neglected. There is no comparative study of the different systems of law prevailing in the world and the lawyers of our country unfortunately consider the British Jurisprudence as the last word on the subject.

The present system of law has to be changed, if law has to serve its purpose. But is it too much to expect the lawyers to indicate the lines of development of the law of our Country? And can the lawyers do this without being properly equipped? Democratic Lawyers' Movement intends to equip the lawyers by encouraging comparative study of the laws of different countries, by making accessible to them the experiences of lawyers of other countries.

With these aims, the West Bengal Association of Democratic Lawyers has been formed. We hope that the Association will prove a useful institution for the people of this country.

ON THE POSSIBILITY OF A UNIFORM CIVIL CODE IN INDIA

By

DR. RAMA CHANDER PAL, M.A., D.PHIL.

(Third Year Student)

Though Directive Principles of our constitution provide for securing a uniform civil code for the citizens, the views on this point are divergent. While perfect uniformity is rather impossible of achievement, the writer asserts here that such uniformity should be attained gradually. —*[Editor]*

Four years have glided away since the Constituent Assembly of India adopted the constitution of a sovereign democratic republic. But nothing substantial has as yet been done to implement many of the directive principles of State policy as given in Part IV of the constitution. In the interests of the dignity of the government the provisions contained in this part have been made unenforceable by any court of law. But it is high time that our administrators appreciated why and to which extent the state had failed to apply these principles in making law. The critics of the government must on the other hand try to understand why the directive principles of state policy could not be applied in legislative enactments. We are at present concerned with Art. 44 of the Constitution of India. This article lays down a directive principle of state policy: "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

Apart from this principle inserted in the constitution there has been made a persistent effort by a section of our citizens to usher in a uniform code of private rights and obligations. There have been on the other hand sincere pleas advanced by a large number of our people that such a step would lead to chaos and disorder. Sociologists and moral philosophers should, therefore, try to find out to-day the best resolution of such divergent views in our social life. It follows necessarily that we must ascertain beforehand the possible reasons for such demands and counter-demands and suggest the optimum measure of changes in social life.

Our legislators who are as a matter of fact hopelessly divided among themselves as to the feasibility of a uniform civil code must not indulge in endless confusion, and the restoration of a balanced opinion will undoubtedly be felt absolutely necessary. But to determine this we must be aware of pros and cons of a uniform civil code and suggest proper remedies in the light of such assessment.

Those who advocate the cause of a uniform civil code are generally found to refer to the cases of social injustice which the code purports to remove to a substantial extent. Such cases of injustice are, they allege, due to the advantageous position of certain people by virtue of the peculiar tenets of religions they profess as also on grounds of caste, sex, place of birth and so on.

The most radical thinkers among such people would even go to the length of asserting that every social right which law recognises ought to be based upon what may be described as a symmetrical relation. A symmetrical relation is such that if it holds between x and y, it also holds between y and x. (For example, 'is equal to,' 'spouse of,' 'different from.') Now if symmetry be the end of social ties, the true test of a democratic civil code is that no citizen must, on grounds of sex, religion, place of birth and so on, be allowed an advantage over another citizen who is denied the same over the former. That this should be a special feature of the proposed civil code will be amply evident when we appreciate that the personal laws of different communities in India have not so far recognised the absolute equality of men and women. For

example, bigamy committed by a woman is punishable throughout India while a Hindu or a Mohamedan male can generally indulge in it with impunity. As regards the Muslim society of India it will suffice to note that in spite of its professed democratic principles of social life the position of a Mahomedan husband is far superior to that of a Mahomedan wife in respect of divorce and allied matters. Even for certain pecuniary troubles in respect of dower any Mahomedan husband of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause (Art. 308, Mulla's Principles of Mahomedan Law). A Mahomedan wife is, on the other hand, entitled to obtain a decree for the dissolution of her marriage, only if she be able to prove that the husband has failed to perform marital obligations. Similar examples of 'asymmetrical' relations may be illustrated by the prevailing differences in respect of the rights of inheritance.

The only reasonable query to put at this stage is whether perfect symmetry and absolute uniformity can be introduced in social life in the best interests of fairness, justice and sobriety. While perfect symmetry in social obligations is nowhere found in the world, India has an additional problem in that her different communities follow different personal laws which have been formed by the tenets of different religions as also by their different patterns of living. A Hindu Code which purports to bring about a uniform code of rights and obligations of the Hindus may satisfy many of us. But a radical thinker of the type we have referred to above cannot be satisfied unless different communities adopt a single code of marriage and inheritance laws based on the perfect equality of men and women. But there is the rub.

First, we have to ascertain whether similar laws in respect of men and women would be of similar advantage to them. For example, the husband of a middle-aged Hindu woman who is proved barren may pray for divorce when a uniform civil code recognises it to be a sufficient plea for the same. But provisions for divorce cannot in this case be in the interests of the hapless wife as it would be in the case of a husband placed in similar circumstances. Secondly, the critics of a uniform civil code would further point out the possibility of chaos and confusion as a result of a large number of changes to be effected in the social patterns of the different communities in India.

The possibility of chaos apart, there are numerous difficulties in enforcing a uniform civil code. Such difficulties are unavoidable when we try to bring about a uniform legislation in marriage rules. For example, a marriage between two first cousins is sanctioned by the personal laws of Mahomedans and Christians while this is strictly prohibited by the Hindu customs in general. The application of the personal laws of one community to another will thus be found to be either too harsh or too rash. Where there are two distinct and alternative patterns of life and conduct, it will be too rash to abolish one and accept the other.

Even among the Hindus uniformity in the laws of marriage and inheritance can in no way be easily introduced. Further, it is difficult to appreciate how the ends of justice can be met in a secular state, when the social evils of bigamy among Hindus is sought to be eradicated by our legislators, when they are apparently afraid or unwilling to change the Muslim law of persons on the same lines. This, we venture to assert, does not indicate that the overzealous legislators of the country are prepared to do justice to the different communities of India.

Fortunately, the progress of a nation is never rectilineal; a civil code need not therefore be reformed once for all. Since symmetry and uniformity are not ends in themselves, but rather means to such ends as justice, peace and prosperity, the demand of bare symmetry and blind uniformity should not determine the course of our social history. Nor should the voice of tradition have the last word on social legislation. So both hastiness and rigidity should be replaced by creative but restrained imagination.

Every part of a statute should be given as far as possible its full meaning and effect and only in an exceptional case may a word or clause be rejected as superfluous. The principle is that such an interpretation must be adopted 'ut res megis valeat quain pereat'.

—*A.I.R.* (7) '53 *Patna* 161.

GREEK CONCEPTION OF JUSTICE

By
SRI TARUN CHANDRA DUTT
(Second Year Student)

In the hands of the greatest thinkers of ancient Greece—Socrates, Plato, Aristotle and others—the idea of 'JUSTICE' developed on the footing of morality. Morality in its turn is the attribute of the virtuous people. Hence it turns out that 'JUSTICE IS VIRTUE IN ACTION'. In fact 'JUSTICE IS THE FULFILMENT OF EVERY MORAL OBLIGATION OF A MAN TOWARDS HIS FELLOW-MEN'.

In the following article the logic of this Greek conception of justice has been neatly unfolded.—[Editor]

Of all the most fascinating books that have never been written perhaps the one that catches my imagination most, as I browse on the history of human civilisation, is that on the 'Ideas and the Ideals of the ancient Greeks'—a record, incomplete in two volumes, of the thoughts and aspirations of one of the most civilised people ever on earth. Somewhere near the middle of the first of these volumes will shine in glorious, eloquent but often unseen letters the chapter on 'The Greek view of life' and the golden circumambient leaves on the Greek idea of 'Justice'. For to the Greeks 'Justice' was something spontaneously entwined with their conduct in daily life, and not, as it is with us, an abstract, and hazy concept left to the preserves of scholarly philosophers and thoughtful jurists. With their characteristic philosophy of faith in human life the Greek thinkers gave to their conception of justice a comprehensiveness and a reality that is astonishing to modern minds.

The Greek idea of 'Justice' was derived from the Greek conception of 'Law.' To both the twin-masters of Greek philosophy, Plato and Aristotle, who moulded Greek thought in this as in almost every other direction, law was a set of ideal rules to be followed by men in their behaviour towards their fellow-men. Law was the sum of all the spiritual limits under the restraints of which human action must manifest itself. The great spiritual limitation upon man has been the limitation imposed by 'reason'. It has been the sacred duty of every human being to circumscribe and limit his instinctive passions by reason. Law as the sum of all the spiritual limits on man was, therefore, identified by the Greeks with 'reason'. As Aristotle put it, "Law is pure reason without the admixture of passion".

But for the Greeks, one of whose greatest and earliest contributions to human thought was the emancipation of much of their philosophy from the stifling influence of religious ideas, morality also consisted in a life according to reason. So there was a necessary equivalence between law and morality, and the codes of law extolled, like moral codes, the virtues of courage, continence and consideration for others—in fact all the virtues that a man should practise as opposed to the vices that he must avoid. In fine, as the supreme moral code of the whole community law set forth before the Greek people the end and the final good which that community pursued.

What was 'justice' then? If law is the same as morality, action according to the contents of law, which is Justice, must be identical with action according to the dictates of morality *i.e.*, Virtue. Thus justice is the other name for Virtue.

In the charming, engrossing pages of the Platonic dialogues one witnesses the gradual

unfoldment of the Greek idea of Justice through the captivating 'flow' of the simple reasonings of Socratic dialectics. There Socrates convinces Thrasymachus, while conversing in the house of Cephalus, that virtue is the excellence of the soul, that the just is the good and the moral, that injustice can never be more profitable than justice and the attributes of justice are those of virtue as well—the qualities of sublime simplicity and a state of blessed happiness. Thus, to use the words of Plato, 'To be just is to have all the virtues in one'.

So Justice is virtue. There is, however, a difference. In a sense justice is highter than virtue; it is virtue in action. It is more than an internal spirit; it is the active fulfilment of an internal spirit in the conduct of a member of society towards other members. To be considerate is 'virtue', to act considerately towards another is 'Justice'.

This then was the Greek idea of 'Complete' Justice. Such a conception of universal justice is essentially connected with the Greek view of the State as an ethical society, which flourished in the congenial soil of the Greek City States.

But what is important for us to remember is the deep reality that such a conception of justice had for the Greeks. One of the great lessons which both Aristotle and Plato taught us is that the ideals of law, taken concretely, are mere lifeless stones and that everything depends on the far deeper question, whether those ideals live, and are rooted, in the minds of the members of the community in which they exist. "Their true reality is not objective, but subjective, ...a law exists so far as it is a spiritual motive, apprehended and acted upon by a mind".

Thus 'Complete' justice primarily meant law-abidingness in ordinary life to the Greeks; but ultimately and in consequence it was "virtue itself in action, virtue as shown by one member of a community in his dealings with others, virtue as the life-breath of a moral community, acting in obedience to law".

And of the profound reality which the Greeks gave to their idea of justice we find the noblest example in Socrates' death-scene in the pages of the 'Phaedo': The hour of sunset is near. In the encircling gloom of the prison sits Socrates, the sage, surrounded by his most beloved disciples, including some of the greatest intellects of Greece. Socrates says that any further delay is needless; he is prepared. The fatal cup of hemlock is brought and Socrates in the most fearless and yet gentle manner drains it. Then he slowly walks about awaiting the action of the deadly poison. His disciples—the young sheep of his flock—break down; they weep. Socrates alone remains calm and asks them not to lament. Then his legs fail. He lies down on his back; from his feet upwards his body becomes cold and stiff. The excruciating pain makes him cover his face. The poison has reached the abdomen; the end is near—there is a deep hush before death. Suddenly Socrates uncovers his face, and what does he say! "Crito, I owe a cock to Asclepius, will you remember to pay the debt"? "The debt shall be paid", answers Crito. There is no answer to that: the end has come.

Well, there is an example of 'Complete' justice—of the fulfilment of every moral obligation of a man towards his fellow-men—coming from the wisest, the best, and the justest of the Greeks. And to talk about such men as these, their lives and their ideas, is ever ennobling and never useless even today.

More instructive lessons are taught in the Courts of justice than the Church is able to inculcate.—Morals come in the cold abstract from pulpits; but men smart under them practically when we lawyers are the preachers.

Anonymous.

EMERGENCY PROVISIONS UNDER THE CONSTITUTION

By

SRI SUBIR CH. MAJUMDAR, M.A., *(Research Scholar, Calcutta University)*
(Third Year Student)

The emergency provisions of our constitution run counter to the provisions for fundamental rights. An attempt has been made here to show how our provisions differ in this respect from those in England and U.S.A.—[Editor]

A dispassionate attempt may be risked to visualise the true import of the emergency provisions under the present constitution of India. Elaborate provisions have been made dealing with emergencies. It is no easy job to evalute the essential characteristics of Part XVIII of the constitution.

Under Art. 352 (1) it is laid down that if the President of India is satisfied that a grave emergency exists whereby the security of India or any part thereof is threatened, whether by war or external aggression or internal commotion, he may, by proclamation, make a declaration to that effect. A proclamation thus issued may be revoked by a subsequent proclamation; shall be laid before each House of Parliament; and will cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. It is not manifest what will happen in case the proclamation is approved by both Houses of Parliament. Presumably it will remain in operation till it is revoked by a subsequent proclamation. Under Art. 352(3) it is stated that a proclamation of emergency may be made before the actual occurence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof. Thus it is found that the 'serene' satisfaction of the President will suffice to take away the fundamental rights assigned to the citizens with so much fanfare of trumpets under Part III of the Constitution, even when there is no actual warfare. Arts. 358 and 359 may be referred to in this connection which provide for the suspension of provisions of Art. 19 during emergencies and the suspension of the right to move any court for the enforcement of the rights conferred by Part III as may be specified in the Presidential order.

Art. 1, Sec. 9(2) of U.S.A. constitution states: "The privilege of the writ of habeas corpus shall not be suspended, unless in cases of rebellion or invasion the public safety may require it". It is thus clear that nothing short of actual invasion [(Exparte Miligan Wall. 2)] or rebellion may justify the suspension of the Writ. Unlike the constitutional provision in our country, no internal disturbance *e.g.* general strike, which may obviously appear to be unpalatable from the executive standpoint, shall warrant the suspension of the said writ of habeas corpus in U.S.A. The executive in England have no power under the statute, to issue regulations to suspend the writ of habeas corpus (Wade & Phillips: Constitutional Law). The House of Lords have laid down in Liversidge vs. Anderson [(1942, A.C. 206 (L.H.)] that the courts would uphold such detention in the interest of national safety, except where there has been an abuse or malafide use of the power or where has been a prima facie wrong application of the power as in a case of mistaken identity.

But though the courts in England would not interfere with the executive power to detain without trial, except in a case of wrong use of the power,—it should be taken into account that the right of access to the courts has never been denied [(Chester v Bateson (1920), 1 K.B. 829)] either dring the Great War I or II, and

there have even been releases [(Exparte Budd (1942) 2 K.B. 14)]. Thus the Indian Constitution which after all remains a hybrid amalgamation of various constitutions of the World denies even the minimum liberty to its citizens in emergencies, which has not even been dared by the constitutions from which ours is borrowed.

So far the fundamental rights are concerned,—excepting the right to habeas corpus,—there is no provision in the U.S. constitution corresponding to Art. 358 of our constitution, for putting into cold storage any one of the fundamental rights either during war or any other emergency, either by the executive or by the legislature. Nothing short of constitutional amendment may suspend the Bill of Rights in the United States. This was enunciated by the early case of Ex Parte Miligan where it was rightly remarked:

"No doctrine involving more pernicious consequences was invented by the wit of man, than that any of its (Bill of Rights) provisions can be suspended during any of the great exigencies of the government."

It may be argued that great changes have been effected since the above statement was made, nevertheless the words contain profound truth retaining validity till this part of the day. Sir Ivor Jennings has remarked *that special powers of legislation have been vested in the centre under Arts. 249 and 250 of the Indian Constitution which authorise the Union Parliament "to trench upon the state list." Art. 356 deals with provisions in case of failure of constitutional machinery in the states which attempts a combination of the provisions of Secs. 45 and 93 of the Government of India Act, 1935 with certain differences. Article 360 states: "If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a proclamation make a declaration to that effect." During the period any such proclamation is in operation, the Executive authority of the Union will extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

A perusal of Part XVIII (Arts. 352—360) would convince any serious student of constitutional law that in times of emergency, such sweeping powers will come to be vested in the Central Government that apoplexy may overtake the centre and anaemia the circumference.

To quote Jennings: "All constitutions are the heirs of the past as well as the testator of the future." It would be pleasing for this our "testator" to bequeath a more sagacious legacy for the future. It is never denied that so long as the State exists, the society must arm itself with certain powers. But what is objected to is that there is armoury in the imposing hands of the Central Executive which the constitution of India does neither grudge nor deny which may destroy the vitality of the body-politic of this Republic.

The liberty of the people and the restricted autonomy of the States may be preyed upon by the Union executive under the garb of emergency.

It is argued that the best protection against any form of whims and caprices by the State lies in the ultimate analysis in a free and intelligent public opinion which eventually must assert itself.

Let it be ardently hoped that no Leviathan would emerge out of our 'emergency lacunae' consuming the elan vital of our constitutional fabric. The trend of events since the constitution was hammered out of the legislative anvil seems to enhance our fear and we apprehend, our ardent hopes be nothing more than dupes.

**Sir Ivor Jennings* : Some characteristics of the Indian constitution.

LAW—IN GUARD OF PEACE

By

SRI JAHAR SEN

(Second Year Student)

"If the price of liberty is eternal vigil, the price of Peace is eternal toil. If the guardians of liberty are the lawyers, the guardians of Peace are the common men"—so says the author. Here he gives an exposition of how to harness Law, both municipal and international, in defence of Peace.—[Editor]

The present century is popularly known as the age of the common man. Curiously enough, the century of the common man is also the century of his Crucifixion. This is the age when chasm between wealth and poverty has set the world aflame. "Reptiles of greed and war spread their breath of poison all around. The sweet and suave message of Peace sounds hollow and satirical." (Rabindra Nath Tagore). The inter-play of the centrifugal forces threatens to shatter the fabric of world peace. But inspite of all these tendencies, the world is now being propelled by a new set of centripetal forces pregnant with abundant possibilities. The new seed of life is being fostered by new sun-shine of hope. A mood of sharp revulsion against *status quo* and all that it represents is clearly discernible. It has its roots not in frustration, but in the aspiration to build the world anew. It must be built by corporate endeavours, entitled to corporate share of its blessings.

Man is, after all, a dreamer. He wants to see the clouds overhead split asunder. He wants to greet the clear moon-light of a happy and peaceful paradise. Simply because of this craving, man is ever in quest of peace. It is through his eternal quest of peace that man makes his own history, and following that, philosophy, politics and, above all, law. If social justice is the condition of peace, law as the harmonising force between individual rights and social justice has from time to time, stood in defence of peace. But, if law is interpreted in the stoic manner as a device to keep man in his appointed groove, it pathetically fails to rise up to the occasion. On the otherhand, when it is interpreted as "the most specialised organ of social control" with its solemn task to "preserve and transmit civilisation" (Roscoe Pound), it has as yet much to contribute to ensure freedom, Peace and Progress. That is why when, in the universal deluge of ideas, men swim about like torpedoed seamen, they often find out and cling to law, both municipal and international, as the coloured bit of straw.

Pragmatically speaking, each state is interested in the pursuit of its own security and in the shaping of its future accordingly. It has, therefore, in the long process of trials and tribulations, evolved constitutions and municipal laws to suit its own ends, some directive principles towards the application of which the whole stock of energy is switched. This age has not yet shaken off the appraisal of parliamentary democracy as the panacea for all evils. British Cabinet, American Federation, French Republic as well as the Republics of India, Ceylon, Indonesia, Burma and Pakistan bid fair as the replicas of parliamentary institutions to usher in equalitarian society. These institutions start from the assumption that the existing order is immutable, that the society consists, and will continue to consist of antagonistic classes. They register the *status quo* and embody it in their municipal laws. The onrush of the fresh tide of events, the changes associated with the flux of the society, cannot find due respond in these political set-ups. Despite these limitations, the constitution of the Indian Union, to be particular, displays some features worth mentioning as indicating her passion for Peace. True to her zeal for the brotherhood of nations, she has given an exposition of her end—the philo-

sophy of good life—in the chapter on the directive principles. Article 51 of the constitution says,

The State shall endeavour to

(a) promote international peace and security,
(b) maintain just and honourable relations between nations,
(c) foster respect for international law and treaty obligations,
(d) encourage settlement of international disputes by arbitration.

Quite in conformity with the peaceful methods of settlement of disputes (as embodied in the U. N. charter) the constitution enshrines in its pages the message of lasting peace and democracy. What was embodied in the constitution, lest it should end in smoke, was given statutory recognition in the United Nations (Security Council) Act XLIII of 1947 and in the United Nations (Privileges and Immunities) Act XLVI of 1947.

Now it devolves on the charioteers of the state to transform the letter of the law into actuality.

Sharply in contrast stands the spectacle of the great people of the U. S. S. R. They are working out a new way of life in defiance of the accumulated traditions and prejudices of the past. The socialist state-system of the U. S. S. R. has miraculously enabled its people to enjoy the best fruits of life, the blessings of their labour. Needles to say, the Soviet Constitution and the Soviet Municipal Laws are as much the embodiment of status quo as the start to the path to be traversed. The Soviet Constitution is a constitution of Peace. It was in full accordance with its spirit that the Supreme Soviet of the U. S. S. R. passed the Peace Defence Act in 1951. The Act declares in no uncertain terms, "war propoganda, in whatever form conducted, undermines the cause of peace, creates the danger of a new war and is therefore, a grave crime against humanity." (Vide, New Times, No. 49, December 5 1953) War propaganda is, thus, perhaps for the first time declared a criminal act in the municipal law of a state.

The Peoples' Republic of China and the new democratic countries of the Eastern Europe, in their legislations touching on international pledge and national venture, have also made profound contributions towards the relaxation of international tension.

Side by side with the municipal laws, there have developed international laws or international rules (to avoid the Austinian puzzle) to regulate the conduct of the states in their mutual dealings. The very process of their growth speaks for their persistent efforts for the promotion of peace and friendship among the states. To look back to the past, there were long chains of experiments to hold the centrifugal forces of the world in balance. The Achean League, the Holy Roman Empire, the German Confederation (1815-1866), the Swiss Confederacy (1815-1840) and the League of Nations in the 20th century may be cited as examples. From the Peace Pact of Paris, 1856, down to the Geneva Convention of 1949, there have grown up a host of purely law-making treaties to control war. Conscious attempts to prevent, renounce and outlaw war were made in the Hague Conferences of 1899 and 1907, in the Hague Treaty of 1914, the League Covenant Art 1016) the Geneva Protocol of 1924, the Locarno Pact (1925), the Briand-Kellog Pact (1928), the General Act of Geneva, 1928 and finally and more categorically in the U. N. Charter.

The peace-loving people of the world looked to the emergence of U. N. with expectant delight. But, tragically their dreams have been shattered. They now see that the U. N. in its short but chequered career has, indeed, succeeded in maintaining not peace, but caricatures of peace. In its domestic jurisdiction clause, unanimity provision and principle of veto lurk its procedural pitfalls. Again in the U. N. the U. S. S. R, China and India, containing half the population of the world, cast only 10% of the votes, whereas 20 Latin American countries, comprising 7% of the world-population, cast 40% of the votes. The whole organisation is thereby utilised as nothing short of an ill-concealed weapon to conserve vested interest. For the success of an international organisation like the U. N., mutual co-operation among the constituent member-states is an essential prerequisite. Let us now examine what little respect the Powers have for the U. N., for its charter and for the great hopes that were reposed in it. The following charges are levelled against the U. S. S. R. by the U. S. A. and the north Atlantic Bloc countries:

(1) The attitude of the U. S. S. R. to the U. N. O. is one of complete and rigid lack of a spirit of co-operation and compromise, culminating in the total withdrawal of the Soviet representative to the U. N. from the Security Council, during the period January to August, 1950.

(2) The depredation of Manchuria, the guerilla warfare waged against Greece, the threats to Turkey, the obliteration of free Government in Czechoslovakia, the ruthless destruction of all democratic opposition in Bulgaria, Hungary, Rumania and Poland—these power-grabbing actions of the U. S. S. R. are gross violations of the U. N. Charter.

(3) The creation of the military force known as Breltschaften by the U.S.S.R. in East Germany is a violation of the Potsdam Agreement and the Anglo-Soviet Treaty of 26th May, 1942.

The following charges are, on the otherhand, levelled against the U.S.A. and the North Atlantic Bloc Countries by the U.S.S.R:—

(1) The principle and the framework of the North Atlantic Pact run counter to Articles 51, 52 and 53 of the U. N Charter.

(2) The U.S.-sponsored "Collective Security" plan culminating in the formation of the Executive Military Agency, is a mockery of Articles 41, 42, 43, 45, 46, 47 and 51 of of the U. N. Charter.

(3) The plan for the formation of the Mediterranean Bloc between Turkey, Greece and Israel as a "Military Alliance" is a flat violation of the U. N. Charter.

The examples of the charges and counter-charges enumerated above are only illustrative and not exhaustive. Evidently we thus see that mutual distrust and hatred impair the very spirit of the U. N.

They have tons of conflict, but not an ounce of co-operation. Over and above that the U. N. is significantly failing to provide for the adequate solution of the following questions; and this also explains in no less a degree its inherent ineffectiveness :—

(1) How to feed the ever-increasing population of the world.

(2) How the problem of tariff barriers is to be settled and raw-materials allocated.

(3) How the permanency of the national frontiers is to be ensured.

(4) How to eliminate the threat of another world war.

Thus the U. N. eventually takes its place in the long chain of experiments in international organisation which have not so far proved successful.

On the otherhand, measures chalked out by the World Peace Council "to eliminate the threat of another world war and to strengthen the friendship among nations" deserve more than a passing notice.

They ask the peace-loving world to put a ban on the Atom Bomb, to reduce armaments, to make the Big Five meet at a table and to sign a Peace Pact. Judged by their face-value, the measures convey nothing substantial. A Pact or no Pact, a state which is resolved upon war may always have it. Peace-movement must not hang on vacuum. It must be linked up with a conscious appraisal of the real causes of war. Subversion of Imperialism-Capitalism is the only corner-stone of permanent peace. Nevertheless, these talks have the merit that they reveal the philanthropic heart of the peace-lovers, enlighten public opinion and help profoundly in the relaxation of international tensions. But these are deceptive days of diplomacy. Happily for us, the politics of the World Peace Council is rooted in its unconditional faith upon common man. In its resolutions adopted in Vienna (November 23-28, 1953) it declares in unequivocal terms.

"The anxiety and fear, the misery and the difficulties of every-day life imposed upon the people by the cold war and armament-drive can and must be eliminated by the actions of the people. In the last resort, peace depends upon them."

Thus the World Peace Council pins its unflinching confidence upon Peace not negotiated, not imposed, but won "by the actions of the people".

If the price of liberty is eternal vigil, the price of Peace is eternal toil. If the guardians of liberty are the lawyers, the guardians of Peace are the common men. If the plant of civilisation flourishes best in the soil of peace, let law announce its rule, assert its sovereignty, restore Peace on earth and thus preserve and transmit civilisation.

EVOLUTION OF INCOME-TAX ACT IN INDIA AND JURISDICTION OF COURTS

By

SRI AJIT CHATTERJEE, M.A., B. COM.

(Third year Student)

The problem of proper administration of justice in the case of litigations re: Income-tax matters, is a thorny one. In the following article some suggestions as to what ought to be the better line of demarcation between judicial authority and executive decisions, are brought forward.—[*Editor*]

Contrary to the popular idea, Income Tax was prevalent even in ancient India. But this 'idea' is an upshot of the absence of such tax in our country for about a century during the days of the East India Company. Thus when it was first re-introduced we were inclined to think that such a tax was being levied in our country for the first time by the Britishers.

Indian Income Tax Act— and its importance

Income tax on the English model was first introduced in India in 1860. But the basis of taxation was the most unscientific so much so that within two decades of its introduction the Act had to be amended for more than a dozen times and was totally suspended for a total period of six years.* These frequent changes in the system of taxation gave rise to great annoyance on the part of the public, and the government officials also were put to great difficulties since it was very trying for them to be fully conversant with the changing law. To put an end to this inconvenience, and to give a permanent shape to the Income Tax Act, a strenuous effort was made in 1880 which was partly successful; but a full-blown Act was not possible until 1886, when the Income Tax Act was thoroughly remodelled and this Act practically remained unaltered till 1916. With the first world war it became necessary to amend the Act so as to cope with the situation arising out of the war and hence in 1916 the Act was amended. Thereafter again an unstable situation arose in the field of Income Tax Act and frequent amendments had to be made. This led the government to appoint the All-India Income Tax Committee in 1921 and according to the recommendation of the aforesaid committee the Income Tax Act of 1922 (Act XI of 1922) came into force on 1st April 1922.

The introduction of the Income Tax Act of 1922 undoubtedly marks an epoch in the history of Indian Income Tax. Since 1922 the Act was amended several times, the last amendment being made by the Income-Tax (Amendment) Act, 1953, but the original Act of 1922 has not been wholly overruled. Even now, unless otherwise mentioned, "sections referred to" indicate the sections of Act XI of 1922. So, although bit by bit the original Act has now been changed to a great extent, that Act has actually been the basis of all subsequent amendments.

The historical evolution of Income-Tax in India under the British regime at once reveals the fact that the authorities felt great difficulties in the proper application of this Act and failed to adopt the accepted principles of taxation. That the Act was unscientific was proved by the low yield of income-tax in our country and no appreciable change could be brought by even several amendments to it. Of course, from economic point of view frequent changes in the Income-Tax Act do not necessarily indicate the weak points in the Act itself. On

* Period of suspension (1) 1865-67 (2) 1873-77.

the contrary, Income-tax levy is always to be made upto-date and must be changed to adjust the socio-economic position of the country; and as such, Income-tax rate is at present revised annually by the Finance Act. But the situation in India was entirely different. Authorities here, in their zeal to amend the Act, were eager to find out a stable statute which, as we have already seen, was not possible until 1922.

Implications of the Act

The implications of the Income-Tax Act are now considered under question of fact and question of law. Of course in most of the cases they are mixed and the highest appellate authority under the Act to decide these questions is the Income-Tax Appellate Tribunal—whose decision is final as to question of fact and no court of law has any jurisdiction regarding this. But as to question of law, High Courts or Supreme Court may hear the appeals. So it is clear that the question of fact is solely decided by the Revenue Authorities, and as to question of law, also up to a certain extent their decision is final and if any of the parties is dissatisfied with the interpretation of law, the High Courts or Supreme Court may act as helping hands to the Appellate Tribunal.

(a) *Question of fact:*

Income-tax levy is obviously determined on the facts of each case and as such a uniform code is difficult to arrive at. Again if certain facts are left to be decided on the merit of each case, different interpretations of the provisions of the law are likely to encourage tax evasion. So it was always desired to make the Income-Tax Act most comprehensive so that every possible fact may be brought within the purview of the Act. But this has made the Act a most complicated one and not helped much to increase the levy of such tax.

(b) *Question of Law*

This is one side of the picture. The other side is equally gloomy to the practising lawyers. The jurisdiction of court in income-tax cases has carefully been kept separate on the basis of an arbitrary distinction between questions of fact and questions of law—which distinction often puzzles not merely the layman but even an experienced practitioner; for, as it has already been said, these questions are generally mixed. So the tiny stream of income-tax cases which is allowed to flow up to the High Courts brings no questions of fact with it; and most of the cases cannot even reach the High Court.

Not only that. A permission to appeal to the High Court on a question of law is not so easy to obtain. Though it is not the final authority, the Appellate Tribunal decides whether any question of law is involved in a case and whether the assessee can appeal to the High Court on that point. If, however, the Tribunal rejects such application the assessee is given an opportunity to make an application direct to the High Court and to be heard on question of law. From the High Court, of course, as usual, the appeal lies to the Supreme Court, but since the first appeal to the court is partial, second appeal, which springs from the first, hardly needs any further comment.

Only thing that remains to be considered under this context is the nature of the jurisdiction of the courts exercised under the Income-Tax Act. Such jurisdiction, it has now been decided, is not an appellate jurisdiction but only an advisory or consultative jurisdiction So it was held that the expression "judgment, decree or final order" of Article 133(1) of the constitution does not apply to the decision of the High Court under Section 66 of the Indian Income-Tax Act. Again on the question whether the Income-tax proceedings under Section 66 can be considered as Civil Proceedings, the court remained silent.*

Conclusion

Before arriving at a conclusion as to what should be the position of the Court with regard to income tax cases something must be said in defence of the present system of assessment and collection of Income-Tax in our country The defence,—and it is a substantial one too—is that if the Courts are given a civil jurisdiction in income-tax cases the delay in assessing

* Jamnadas Prabhudas, Bombay v. Commissioner of Income-Tax. Bombay City (1932) 22 I.T.R. 150.

and collecting taxes will be enormous. The evolution of income-tax in our country will amply suggest that, whatever be the loopholes in the Act at different stages, it did never face a stagnation arising out of *law's delay*. But for the sake of equity possibly the courts would not have been given a chance to hear on questions of law even.

As in most countries, our system also is based on the principle of assessment and collection of taxes by the Revenue Authorities. But the conflict arises as to the basis of taxation. Undoubtedly every system of taxation aims at maximum total levy and in that respect the system of taxation should not destroy the incentive to business. Moreover the system should be such as to give incentive to businessmen to plough back their profits into the business. If that is not so, much of the profits are likely to go underground and thus help encourage evasion much to the detriment of maximum collection. It is in such conflicting cases that the courts will apply the directive principles underlying taxation. Of course, in the Income-Tax Act some such incentives have been provided for or included afterwards. But in India, which is now on the threshold of large-scale industrialisation, such incentives should be given after due consideration and no comprehensive Act in the field can be complete in itself.

So at present it can be considered to be too hasty to try to divide the income-tax cases into two classes *i.e.* those involving questions of fact and those involving questions of law. If such a division is allowed to remain in force it is doubtful whether the courts can judge the merit of the facts of each case and whether it can help the establishment of a sound system of taxation in our country.

As to the question of delay involved, the cases should be heard within the time required by each case and the Court shall not deviate from the guiding principle of maximisation of tax collection. Moreover, businessmen in normal circumstances will try to avoid litigation if the Court is given the power to consider question of fact also, particularly when the facts do not have much merit in them.

Thus, if the Judiciary is allowed to play a full-fledged role in the field of income-tax, it will, in the long run, help to establish a sound system of taxation which will ultimately lead to the augmentation of the tax-contribution to the State Exchequers.

"The Framers of Income-Tax Act should concern themselves with seeking an optimum point between complexity and inequity".

* * *

Flourishing Industry

A person, who was delivering a lecture on the incidence of taxation and the development of industries in a country, concluded his lecture by asking "What then do you consider can be the most flourishing industry when lions' share of the profit is taken away by the income-tax, super-tax, sur-charge, local-tax, excess profit tax"?

One of the students who was listening to the lecture with all attention throughout promptly gave the reply—"Tax Evasion Industry".

(M. S-C.)

CONCEPTION OF LAW IN THE SOVIET UNION

By
SRI RATHINDRA KR. CHAKRAVARTI
(Second year student)

In the light of the Materialist Interpretation of History, as enunciated by Marx, a new conception of "Law" has been developed in the Soviet Union. The writer clearly explains this new conception and points out its great merits as an instrument of social betterment.—[Editor]

U.S.S.R.—the cynosure of all eyes in modern times—exercises a magnetic influence over every nation of the world in all spheres of life—social, technical and even legal. She has developed a concept of law which is an open challenge to the other legal philosophies of the world. Economics is the base on which this massive structure of law has been erected there.

The most obvious characteristic of law is that it is coercive. Western Democracies look on law as a body of rules, equally binding upon private persons and government officials, administered by independent courts, and amendable only by regular and accepted political processes. In the Soviet Union, however, public interest is always superior to the interests of individuals. "The law of the *bourgeois* state", declares the Communist Manifesto of Marx and Engels, "is but the will of your class made into law for all, a will, whose essential character and direction are determined by the economic conditions of existence of your class".

In 1938 Vyshinsky also defined law as "the corpus of rules of behaviour expressing the will of the ruling class, established by legislation and also by custom sanctioned by the state, and secured by its coercive power in order to protect, to strengthen and to develop such social relations as are favourable for the ruling class".

Against the *bourgeois* conception of law it has been objected that it neglects the all-national character of the Soviet State where no differentiation between ruling and ruled classes remains, and also that by including custom it obliterates the distinction between law and morality. Vyshinsky corrected this definition by applying it concretely to the conditions of the Soviet state.

"Socialist law during the accomplishment of socialist reconstruction and the gradual transition from socialism to communism" is defined as a "system of norms established by legislation by the State of the Toilers and expressing the will of the whole Soviet people, led by the Working Classes headed by the Communist Party, in order to protect, to strengthen and to develop socialist relations and the building of a Communist Society".

This, then, is the Soviet concept of law today. But throughout the pre-revolutionary days, Soviet law was a tool in the hands of the dominant class which served their interests. In those days the coercive power of Soviet law derived its sanction from the exploiters of the people much against the interest of the mass. However the classless condition of society which is now prevalent in Soviet Russia, has effected a fundamental change in the application and theory of law. The primary and sacred objective of the Soviet State and Soviet law has been to defend the interests of labour against capital, the interests of popular masses against a handful of exploiters and parasitic elements of society. (Arts. 1,2,3). *Bourgeois* democratic countries also claim that their people too hold the helm of destiny. But the U. S. S. R. is rather reluctant to subscribe to this view, for she holds the opinion that unless a socialist

system of economy and socialist proprietorship in the means and instruments of production hold sway, this claim amounts to an absurdity.

Socialism being the accepted principle which pervades the domain of Soviet law, the latter has come to take less and less recognition of private law. This has not been an abrupt change but the result of a gradual process. Thus Lenin remarked,

> 'For us every thing in the province of economics is in the domain of Public Law and not of Private law. We admit only capitalism of the State ..... Hence our task is to broaden the application of intrusion by the state into the relationships of "private law", to broaden the right of the state to abrogate 'private' contracts."

Marshall Stalin went a few steps ahead Stalin expressed the opinion that during the phase of dictatorship of the proletariat they cannot claim to have established the Communist Principle, namely 'from each according to his capacities to each according to his needs.' They could only assert to have achieved the Preliminary stage when 'from each according to his ability to each according to his work' is the ruling principle. There is not the slightest doubt that each further success of socialism will see ever-increasing obliteration of class distinctions and ever growing approximation to the above communist principle.

However, to appreciate fully the conception of law as develop in the Soviet Union, one has to go back to the fundamental principle guiding the progress of the Soviet civilization. It is the principle of the Materialist interpretation of History as enunciated by Karl Marx and his followers. In the light of this fundamental principle the idea of 'Law' can be expressed thus:—

> 'Law is based on society, not the opposite. It is rooted in the material conditions of life and is part of the 'superstructure' over the economic structure that conditions its very existence: its substance, form and development. Juridical relations are based on economic relations—legal systems are but reflections of corresponding material arrangements in production and exchange. Law, thus, is tied to the chariot-wheels of economy. It can neither rise above nor fall below the economic level of a given society, but must correspond to, and is basically co-ordinated with, it. From this basic postulate the conclusion is drawn that law as an institution is the expression of the will of the class dominant in the given society at and by virtue of the stage it has reached in material evolution.'

Another distinctive characteristic of Soviet law is its definite imposition of duties in addition to the granting of rights in the Constitution.

> Duguit writes in 'LE DROIT SOCIAL':—
>
> "I should like to post up the following passage of Comte in the Chamber of Deputies, "Every man has duties towards every other man, but no man has any right properly so called. In other words, the only right which any man can possess is the right always to do his duty".

The people's progress in Soviet Russia has been unique. In U.S.S.R. the 'Socialist state of workers and peasants' exists not only in theory but also in practice. This is evident from their conception of law and above all from the constitution of the Courts. Though the Supreme Court and the Special Courts of the U.S.S.R. are elected by the Supreme Soviet of U.S.S.R. (Art. 105), the Courts of Territories, Regions and Autonomous Regions are elected by the Soviets of the Working People's Deputies of the respective areas (Art. 108), and the People's Courts are elected by the citizens of the districts on the basis of universal, direct and equal suffrage (Art. 109).

When the Law is broken down, injustice knows no bounds, but runs as far as the wit and invention of accusers, or the detestation of persons accused, will carry it.

Anonymous.

THE INDIAN PRESIDENT VIS-A-VIS PARLIAMENTARY SOVEREIGNTY

By
SRI SUSIL BHOWMICK
(*Third year Student*).

One of the most important controversies raging over the different provisions of our constitution centres round the question whether we are going to have a Parliamentary or a Presidential form of government under the new set-up. In this article the writer contends and demonstrates convincingly that it is the Parliamentary system that the new constitution ordains in the final analysis for the people of India.—[Editor]

The constitution of India is a written one. We have set up a Republic with a President at the head of the state. Unlike the President of U.S.A. our President is not the head of the government. He can not be said to be even like the English king. He is to some extent like the President of the French Republic. The President of India comes to office by a process of indirect election. He is elected by an electoral college consisting of the elected members of both Houses of Parliament and of the members of the State Legislative Assemblies. Thus he is conscious of his strength. The king of England does not acquire such strength; it cannot belong to a hereditary king.

Now we propose to examine the position of the Indian President *vis-a-vis* Parliamentary sovereignty. It may be stated by a student of the school of Analytical Jurisprudence, that there is a legitimate apprehension of this office being turned into a dictatorship. Let us see whether such an apprehension is justifiable or not. Article 53 of Chapter I, Part V of our constitution runs as follows—(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this constitution.

(2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

The executive power of the Union is thus vested in the President and is exercised by him either directly or through officers subordinate to him. This leaves clear scope to the President, if he so chooses, to become a real and not merely nominal executive of the Union. Under the authority of the constitution he can exercise that power fully. The provision of the constitution leaves a wide field for the President wherein he can rule and not merely reign.

The extensive powers granted to the President under different sections of the constitution may lead one to confirm the above apprehension. He appoints the Prime Minister and other members of the Council of Ministers. He appoints the Advocate General of India, the Attorney General for the Union, the Supreme Court Judges, the Judges of High Courts, the Comptroller and Auditor-General, the Governors of Part A States, the Chief Election Commissioner, the Chairman and other members of the Union Public Service Commission, the Finance Commission etc.

The President forms an integral part of the Union Parliament. He has the power to summon and prorogue the Houses of Parliament and dissolve the House of the People subject to some conditions; he is required to assent

or withhold his assent to a bill passed by Parliament or, if it is not a Money bill, to return it to the Houses with messages for its reconsideration in whole or in part; he is required to cause to be laid before Houses of Parliament the annual Financial Statement of the Union; no demand for grant may be made except on the recommendation of the President; when Parliament is not in session and circumstances arise requiring immediate action in the opinion of the President, he may, subject to some conditions, promulgate ordinances having the force of law etc.

Last but not the least important are the emergency powers of the President. In Article 352 of the constitution the President, if he is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, may, by Proclamation, make a declaration to that effect. Again in Article 360, if the financial stability or credit of India is threatened, the Presidnent may by a Proclamation make a declaration to that effect. Thus we find wide powers are given to the President who can even suspend some parts of the constitution in particular areas if he is satisfied that grave emergency exists there.

On the otherhand, there are also provisions in our Constitution which will promote the development of Parliamentary Sovereignty in India. Art. 74 says, there *shall* be a Council of Ministers to aid and advise the President in the exercise of his functions. Thus though our President is the titular chief executive, our Council of Ministers at the Centre with the Prime Minister as its head constitutes the real executive. This is the essence and the spirit of our constitution. Whatever may be the letter of the law, we must try to understand the real spirit of it; otherwise it may lead to some needless confusion. Thus the President is bound by the constitution to have a Council of Ministers. He must summon the person who commands a majority in the House to form the ministry and whoever may be in the confidence of the House will act as the Prime Minister. Now, if the President acts against the advice of the Council of Ministers, the Council will certainly resign. For Article 75(3) requires that the Council of Ministers shall be collectively responsible to the Lower House of the Legislature, and the Council will obviously refuse to undertake responsibility for actions of the President that are taken against their advice. Hence the President who cannot do without a Council of Minister must call upon the leader of the majority-party in the House of the People to form his Council of Ministers. Again our President occupies almost the same position as the king in England. He is the head of the state but not of the government. In U.S.A. the President is not only the chief executive but the administration is also vested in him. In our case the President will be bound by the advice of his ministers, his relation with his ministers being the same as that between the king of England and his Ministers. The authors of the constitution have not expressly stated in our constitution that the President in the exercise of his functions is always to act on the advice of his ministers, but have preferred to leave this to convention as in the United Kingdom.

The supreme command of the Defence Forces of the Union is vested in the President, but its exercise is to be regulated by law. It may be mentioned that all executive action of the Government of India is expressed to be taken in his name. He is required, however, to take an aoth that he will faithfully execute the office of President and will, to the best of his abilities, "preserve, protect, and defend the constitution and the law".

The constitution, however, lays down that the Prime Minister is to be appointed by the President, that the other ministers are to be appointed by the latter on the advice of the Prime Minister and that the ministers are to hold office during the pleasure of the President. It means that the ministers are liable to be dismissed by the President at his discretion.

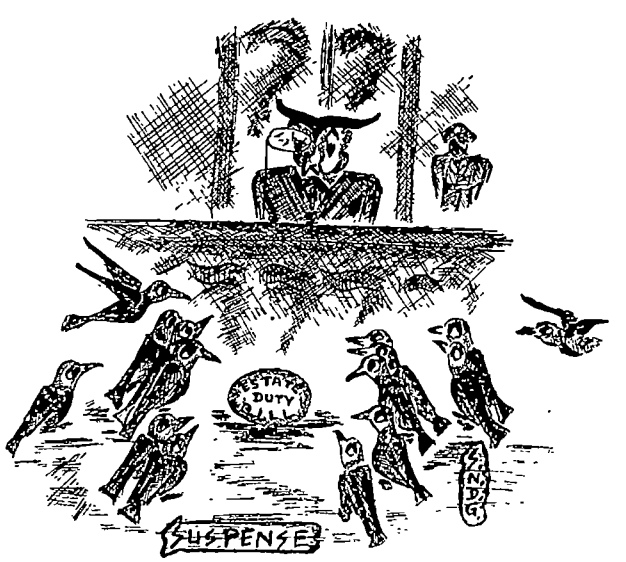
Thus there may be serious constitutional crisis if the President dismisses a Council of Ministers which still commands the confidence of the House of the People or if the Council of Ministers resign as a protest against the conduct of the President. If the President forms an alternative Council of Ministers, the Council may not continue for long and the President on the advice of the Council may

dissolve the House of People and order a general election. But if the verdict of the people goes against the policy of the President and that of his new Council of Ministers, what will happen? The party having the confidence of the majority may pass a vote of "no-confidence" against the new Council of Ministers. Moreover the House of the People may refuse to grant necessary supplies in respect of voteable items of central expenditure. This will mean a deadlock and last of all, impeachment proceedings against the President may be instituted. But no President is ordinarily expected to run the risk of impeachment and removal from office. Thus ultimately Parliamentary Sovereignty will prevail. The President will not have the remotest chance of becoming a dictator under our constitutional set-up.

We have developed a Parliamentary system of government ever since the introduction of Montford Reform in India and we are familiar with the working of the Parliamentary system for a long time. As the principles of Parliamentary system have already been firmly established in our country, let us now hope that they will be respected and duly observed in the future.

It has pleased Providence to place us in such a state that we appear every moment to be upon the verge of some great mutation. There is one thing, and one thing only, which defies all mutations; that which existed before the world, and will survive the fabric of the world itself; I mean justice; that justice, which emanating from the Divinity, has a place in the breast of every one of us, given us for our guide with regard to ourselves, and with regard to others and which will stand, after this globe is burned to ashes, our advocate or our accuser before the great Judge, when He comes to call upon us for the tenor of a well-spent life.

Edmund Burke.



Take 'em in Light Vein

Compiled by
SRI PRATYUSH KUMAR GHOSE (*First year Student*) and SYED MUSHTAQUE MURSHED (*Second year Student*)

"Hearsay testimony" said a Detroit judge, "is merely having a fine sense of rumour."

* * *

"Have you ever been up before me?"
The prisoner did not budge
He looked at the court and made this retort—
"What time do *you* get up, Judge?"

* * *

Many a lawyer, who swears he has been wedded to the truth since infancy, is in reality a widower.

* * *

Divorce is one man's mate and another man's poison.

* * *

Paul Morris comes forward with this classic:
Hurrah! I have found the solution.
I've finally delved to the source;
And now I can tell you that marriage
Is the principal cause of divorce.

* * *

You'll have to go a long way to find a last will and testament that will top this:
"Being of sound mind and understanding, I spent every goddam penny I had before I died".

* * *

A lawyer is a guy who shoots from the lip.

* * *

He was on trial on a charge of murder. The case for the prosecution was so overwhelming that a sentence of death was inevitable. He engaged the leading counsel of the day for his defence. The brief was accepted on the understanding that the counsel would be paid a very substantial fee if he could succeed in getting his client a life sentence instead.

Learned counsel argued vigorously before the jury and when the jury retired for the deliberations he followed them into their chamber and pleaded again for three hours. At long last he reappeared once more in the court room and with a flush of triumph on his face he ran up to his client and assured him that he had faithfully performed his part of the contract. The client was amazed that difficult though the task was it could take so long. Counsel replied: "Don't you think it was easy. It took me three solid hours to make the jury admit my contention *viz.* that a life sentence was the proper punishment in this case. You see, they were all for acquitting you."

* * *

In a case of larceny a farmer was cited as witness for defence. Now this farmer was a good-hearted fellow and for no reason at all was addressed by every one as Colonel. The judge was unable to shake his testimony. So at last he resorted to sarcasm: "Pray, of what regiment are you Colonel?". The farmer retorted: "You see, your honour, it is this way. The Colonel in front of my name is just like the Honourable in front of yours. I don't mean nothin' at all."

* * *

The jury had returned from their deliberations. The judge asked the Foreman if they had come to a decision. The Foreman sought permission to ask the accused one question before announcing the decision. The permission was given and the Foreman asked the accused: "Would you prefer A.C. or D.C.?"

* * *

Lawyer: Well, Doctor have you realized it that one slight mistake on your part and your patient goes six feet down?

Doctor: My dear sir, have you realized it that one slight mistake on your part and your client goes six feet up?

* * *

The great trial began. Every inch of space in the crowded court room was filled up. The first witness for prosecution was a slended, tender lady. She was so impressed by the scenes enacted around her and the great sense of the occasion that she thought that she had to address every body as "M'lord". The expression appealed to her—it was fascinating. A very young counsel rose to examine her and in answering every question he put, she addressed him as "M'lord". At this he started blushing and the judge observing his embarrassment remarked: "Let us hope it is an intelligent anticipation of events."

PRESS LAWS IN INDI

By
SRI ANJAN KUMAR BANERJEE,
(Second Year Student)

The recent appointment of the Press Commission by the President of our Republic has turned attention towards the condition of Press-Laws in our country. Here the writer delineates the history of Indian Press -Laws, which is also the history of suppression of the Nationalist Press by the erswhile British rulers of our Country. We heartily join with him in hoping that the report of the Commission will go a long-way towards safeguarding the freedom of the Press and ensuring the smooth development of healthy Journalism in India—[Editor]

Of all the Commissions set up by the President of the Indian Republic since independence, the Press Commission which is still holding its sessions, recording evidences from eminent Journalists all over India, is the most important one, not only because it deals with the fundamental rights of the people but also because on the report of the Commission, the future of Journalism and journalists of our country hangs. To present a full picture of the course of Press-laws in India, it will be prudent to date back to the days of the British who first introduced laws relating to the press in our country.

"It is not by laws, far less by bayonets, that nations are governed; they may enable either a man or a nation to conquer the world but not to rule it. Sympathy, boundless sympathy can only conquer the hearts of a people,"—this, though coming on from one of their own, Cardinal Newman—was unfortunately not appreciated by the British when they came to rule over India. Fully aware of their own short-comings and the inequities of their measures, they, particularly in India and Ireland, did not always allow the freedom of expression to the conquered countries, especially when they were critical. They regarded the newspapers with suspicion and sought every opportunity to stifle public opinion by curtailing the liberty of the Press. "The people ! The people ! what have the people to do with the laws except obey them?"—was their say. Being suspicious of the Press, especially of the Nationalist Press, the British even deported English Journalist *e.g.,* William Bolts, J. A. Hicky, William Duane, Silk Buckingham etc. who dared criticise the officials and their policy. Whenever the Nationalist Press became too loud in their protests, officialdom scented danger and tried to attack them like sleuth-hounds. But the nation was in no mood to let injustice go unpunished. To cure the canker of misrule, the Indian Press fought always valiantly braving the wrath of the blundering bureaucrats who, in their turn, tried to circumscribe the liberty of the Press by imposing fetters after fetters, laws after laws on it.

Censorship was first clamped down on the Press in Calcutta in 1799 when 'Indian Mirror' advocated the cause of Tipu Sultan. In 1799 Lord Wellesley's Government laid down the following rules to regulate the activities of the Press: First, every printer of a newspaper to print his name at the bottom of the paper; Secondly, no paper to be published on Sunday; Thirdly, every editor and proprietor of a paper to deliver his name and place of abode to the Secretary to the Government etc. At this time Lord Wellesley proposed to publish a

Government organ but his proposal was turned down by the Court of Directors. In 1818 at the time of Lord Hastings, censorship was relaxed. But the then Chief Secretary to the Government, Mr. J. Adam published in the Government Gazette (March 20, 1823) some rules to regulate the future publication of newspapers and periodicals within the settlement of Fort William. But objecting to these rules which were to assail the liberty of the Press, a petition signed by Chandra Kumar Tagore, Dwaraka Nath Tagore, Ram Mohon Roy, Gouri Charan Banerjee, Hara Chandra Ghose and Prasanna Kumar Tagore was made. The petition, however, was rejected by the Privy Council and the Rule Ordinance and Regulation became law on 4th April, 1823. In 1826, Lord Amherst issued a circular prohibiting the servants of the East India Company from having any connection with the public Press in any way. Under William Bentinck, who came in 1829, the Press was never seriously molested except on one occasion *i.e.* at the time of introducing "Half Batta". Lord William was succeeded by his Secretary Sir C. T. William Metcalffe who, being a staunch advocate of the freedom of the press, instructed Mr. T. B. Macaulay, Legislative Member, to draft a Bill to confer freedom on the Press in India. The Bill became an Act in 1835. But though the authorities in England expressed their disapproval of the action of Sir Charles Metcalffe bestowing freedom on the Press in India, for twenty years and more it was not considered necessary to fetter that freedom.

One of the measures taken during the dark days of the Sepoy Mutiny was the Press Act. On the 13th June, 1857, a Bill, introduced by Lord Canning himself, was passed into an Act—Act XV of 1857—to regulate the establishment of Printing Presses and to restrain in certain cases the circulation of printed books and papers. The Act made no distinction between the English and the Indian Press and its duration was limited to one year.

The Act of 1835 was replaced in 1867 by the Press and Registration of Books Act and till 1878 the Press was left undisturbed. When Lord Lytton appeared in India as the Governor General, a Bill was introduced in the Legislative Council and passed into law as Act IX of 1878 on the 14th March. Its main object was to place newspapers published in the vernacular languages of India at a disadvantage and furnish the Government with more powers than the existing law provided. The striking characteristic of this Act was that for the first time the Government put its seal of sanction on an invidious distinction between one section of the Indian Press and another, exempting the Anglo Indian Papers from the operation of a law which militated against the freedom of the Press. The futility of attempting to fetter the press by such puerile means was demonstrated by the Amrita Bazar Patrika suddenly appearing as an English newspaper. "Someprakas" stopped publication as a protest against the vernacular Press Act which was also denounced by Mr. Gladstone in the House of Commons on July 23, 1878. And when in 1880 the Government was changed in England and Mr. Gladstone came into power and appointed the Marquis of Ripon as the Governor General, the latter came to India with instructions to repeal the Act. It was repealed in 1882 by Act III of the year. Then the Government passed another Act (XV of 1889) to prevent the disclosure of Official Documents and Information. And in 1898 by Act IV of that year section 124 A of the Indian Penal Code (introduced in 1870) was repealed and a new section to deal with "Sedition" substituted in its place. In 1903 the official Secrets Act was amended so as to include civil matters along with the naval and military matters covered under the earlier Act of 1889. But this Act proved a dead letter. The publication of documents like the Hallet Circular, the Operation Asylum and the Puckle Letter might have been offences under the Act but the Government wisely did not risk prosecution. During the period of 1931-46, there was only one prosecution throughout India.

The Anti-partition agitation in Bengal, the Surat split and the Emergence of Ex-

tremist leadership proved further provocation to Government and in 1908 the Newspapers (Incitement to Offences) Act was passed. It authorised the forfeiture of the press in which offending newspapers were printed. In 1909 nine prosecutions were instituted and in seven cases the press was forfeited. Next year the Press Act of 1910 which armed the Government with power to demand securities, and to forfeit them was passed. In March 1921 a Committee backed by Sir Tej Bahadur Sapru was appointed to dust up the rusty legislations in the armoury of repression. The Committee recommended the repeal of over a score of Acts and among them were the newspapers (Incitement to offences) Act and the Press Act of 1910. Hardly had the Press Act been repealed when an agitation was set on foot that the Indian States should be protected against seditious attacks on them in Newspapers published in India. The bill had a "forceps delivery" as the Governor-General had to use his reserve powers and certify the introduction of the Bill. Twelve years later there was another States Protection Act with enlarged emergency provisions.

When the Congress and the Government came to another head-on collision at the end of 1931, the Press (Emergency Powers) Act was amended by the Criminal Law Amendment Act of 1932. On the outbreak of the War, the Government of India armed itself with the Defence of India Act and assumed wide powers to control all publications. Besides this, the Criminal Law Amendment Act was also used to prosecute publishers.

Indian Press was also harassed under the Law of Defamation and the Law of Contempt of Court. After the repeal of the Press Act in 1922, the Government was advised that instead of prosecuting editors for sedition it might be more effective if the Government officers were encouraged to institute defamation proceedings.

Apart from these sections of the Penal Code the work of the Press was often hampered by orders under section 144 of the Cr. P. C., the Sea Customs Act and the Indian Telegraph Act under the alien administration.

In response to the repeated demands from the press for the examination of existing laws, the Interim Government appointed an Enquiry Commission in 1947. Despite the lack of popular interest and the indifferent co-operation from the Press, the Commission went through its task and submitted its recommendations in 1948. It recommended the repeal of the Press Act, the Indian States Acts (1922 and 1934) and the Foreign Relation Act. With the passing of the Indian Independence Act and the inauguration of the new Constitution, much improvement was expectantly awaited. But the press was taken by surprise when it found that in a Bill for the amendment of the Constitution published in May in 1951 there was a clause which sought to amend Art. 19 (2) in a manner which would greatly widen the scope of the Government's inroads on freedom of speech and expression guaranteed by Art. 19 (1). The press generally felt that the Amendment to Art 19 (2) was uncalled for and unwarranted and that its real effect would be to restrict gravely the amplitude of freedom vouchsafed to the press under the constitution.

It is gratifying to note that to make an enquiry into the state of the Press in India, in the lines similar to the Royal Commission's enquiry into the condition of the British Press four years ago, a Press Commission has recently been set up by the President of India. It is expected that the Commission by its valuable recommendation will help Government bring forward shortly a comprehensive legislation, which will replace existing restrictive press laws by a measure which will fully safeguard the freedom of press and pave the way for the smooth development of healthy journalism in India.

DOES HINDU WIDOWS' REMARRIAGE ACT PUT A PREMIUM ON IMMORALITY ?

By

SRI DEBABRATA GHOSHAL

(*Third year Student*)

The ancient texts of Hindu Law have to be amended in many places to suit the needs of modern times and ideas. The Hindu Widows' Remarriage Act is one such amending legislation. But one of the dangers of piecemeal amendments of existing law is that serious anomalies often result therefrom. This interesting article shows that the above Act is not free from this danger—[Editor]

"A virtuous wife must be maintained even by doing a hundred misdeeds"-Manu cited in the Mitakshara.

"A woman is not entitled to the heritage: for, a text of the Revelation says, 'Females are devoid of **prowess** and incompetent to inherit' "-Baudhayana cited in the Dayabhaga.

It seems that the right to property of the Hindu woman was not recognised for a very long time. It has only recently been partly recognised in Hindu Women's Right to Property Act (Act XVIII of 1937). But even according to the ancient texts, the widow succeeds to the estate of the sonless husband, on the ground of conferring spiritual benefits on the husband. The author of the Dayabhaga, upon the authority of the texts, explains the term 'sonless' to mean destitute of son, grandson and great-grandson. The author of the Dayabhaga further states that next to the male issue, the widow may confer spiritual benefits by practising austerities and adds that the widow may also cause her husband's soul to fall to the hell by leading a vicious course of life. But at the same time the widow cannot perform the parvana sraddha. Thus, she inherits because of being the surviving half of the deceased husband. So it is needless to say that "the sonless widow keeping unsullied the bed of her lord and remaining virtuous and submissive to her superiors shall enjoy the heritage moderately till her death; afterwards the heirs (of the husband) shall take."

Consequently the question of chastity comes along with that of inheritance. Unchastity of widow is highly condemned in Hindu law and it is a settled law of all schools to exclude the unchaste widow from inheritance. In other words, a wife's right to be a heir of her husband is based on her fidelity and loyalty to her husband. Devotion to the deceased husband constitutes in remaining the half of the husband, for which the widow inherits. So the widow becomes divested of the inheritance by giving up that character by re-marriage. Further it is said, "if a woman is licentious, her abandonment is ordained"; of course, this is to be read in a qualified sense, because if an unchaste woman begged and obtained pardon from her husband during the life-time of the husband, the widow may inherit her deceased husband's property though she was once unchaste. [**Rani Dasya v. Golapi**[1]]. It has been further held by the courts that the condition of chastity applies not only to the widows but also to the mother

[1] 34 C. W. N. 618

[**Ramnath v. Durga**[2]], to the daughter [**Ramanoda v. Raikissari**[3]] and to all women heirs [**Rajabala v. Shyama**[4]] of the deceased owner. In the case **Trailokhya v. Radhasundari**[5] Justice Asutosh Mookerjee held that an unchaste mother could not be a heir to her deceased son. But there is a great deal of conflict of decisions with respect to the effect of unchastity of the mother or the daughter on their rights of inheritance. The Bombay, Allahabad and Madras High Courts have held that unchastity as a cause of disinherison applies to the widow alone [**Ganga v. Ghasita**[6]]. Indeed, in our understanding of Hindu law, there are different grades of unchastity so that it admits of degrees; and unchastity should be of the gravest character to justify exclusion from inheritance. Mere unchastity not followed by conception may not justify the exclusion from inheritance of female relations other than the wife whose conjugal fidelity to the husband is the essence of her heritable right. A woman other than the wife committing adultery is purified by catamenia and, if she is not desirous to do that sinful act again, she becomes pure by Prajapatya rite.

Now today the Remarriage of Hindu Widows Act is in force. Under this Act also a widow by remarriage forfeits her right of inheritance to the estate of her first husband. For the right of a widow to inherit the property of her husband is conditional; as Section 2 of the Remarriage of Hindu Widows Act says, "all rights and interests which any widow may have in her deceased husband's property by way of maintenance or by inheritance to her husband or to his lineal successors or by virtue of any will or testamentary disposition conferring upon her without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her remarriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same." But this condition can not apply in the cases of mother and daughter, because their unchastity does not prejudicially affect the spiritual welfare of the deceased owner. The mother inherits because of her capacity to confer secular benefit, and the daughter inherits because of her capacity to be the mother of the grandsons of the deceased. Thus it has been held by all High Courts of India that a remarried mother is entitled to be the heir of her son by the first husband [**Akora Suth v. Boreani**[7], **Harakishore v. Thakurdhon Barsudas**[8]]. In the case of Akora v. Boreani (**supra**) the facts were that a Hindu died leaving his widow, minor son and a son of a predeceased wife; after his property became vested in his sons, the widow remarried; then her minor son died and her son's share of the property went to her step-son. The remarried mother brought a suit against her step-son and she got the judgment in her favour as a real heir of her son by the first husband. (But we may note that even in the case of the widowed mother, if she first inherits property from her son and then gets remarried, she will be divested as per Sec. 2 of the Hindu Widows' Remarriage Act).

Now we know that an unchaste widow is not fit for inheritance. But what about her subsequent unchastity after inheriting the property of the deceased husband? It is said in **Maniram v. Kery Kolitani**[9] that subsequent unchastity will not divest that which is already vested in her. (Justice Mitter's minority-judgment differs from this decision and holds the view that the widow will be divested due to her subsequent unchastity which is not to be underestimated and belittled).

Is it not, then, the case to-day that while a woman will not be divested by her subsequent unchastity, a chaste woman in-

[2] 4 Cal.
[3] 22 Cal.
[4] 22 C. W. N.
[5] 23 C. W. N.
[6] 1 A.
[7] 1 W. R. 82
[8] 26 C W. N. 925
[9] 5 C. 19 W. R.

heriting her husband's property will be divested by subsequent remarriage? Is it to be understood that the deceased husband condones subsequent unchastsity but not subsequent remarriage?

Under the circumstances would it be misleading to think that the present law encourages women to remain unchaste and enjoy the property of their deceased husbands than to get remarried and lead a peaceful life in decency and decorum?

May we not conclude from this that, in the eye of Hindu law, as it stands now, adultery has been made more praiseworthy than remarriage? Would it be wrong to suggest that subsequent unchastity without remarriage ought to divest the property already vested in the widow, while subsequent remarriage of the widow ought not to divest the same? Is it not high time that the Indian legislators move themselves in this matter?

Defamation.

B, having felt insulted at the behaviour of A, came to his advocate to bring a defamation suit against A. Advocate asked him what actually A did for which B sought for his advice.

B: "After talking for sometime he became furious and said 'you're an idiot and need the advice of an idiot'."

Advocate: "And what did you do then"?

B: "I thought; (after a pause) and then straight came to you, as directed".

(M. S-C.)

* * * *

UNIVERSAL DECLARATION OF HUMAN RIGHTS

By

SRI NIHAR RANJAN DHARCHOWDHURY

(*Second Year Student*)

Though the General Assembly of the U.N. adopted the universal declaration of Human Rights, it is apparent to-day that the U.N.O. has failed to implement it. The author points out that the forces of Recialism and Colonialism are the chief obstacles to such implementation. Yet the Declaration has a moral and inspirational value, and may be the day is not far off when it will guide human affairs in the different countries of the world.—[Editor]

The struggle for the defence of fundamental human right is the age-old struggle of humanity. Among gallant soldiers of this epic struggle for the recognition of man as man were Abraham Lincoln (1809-'65) of the U. S. A., Nabuco (1849-1918) of Brazil, Montesquieu (1689-1755) of France, Pestalozzi (1746 1827) of Switzerland, Emmeline Pankhurst (1858-1928) of England, and Mahatma Gandhi (1869-1948) of India.

Fourth Historic Document.

The Universal Declaration of Human Rights is the fourth historic Document of its kind. The Magna Carta or the Great Charter sealed by King John of England in 1215 A. D. came first, which recognised the supremacy of law over Kings, lords and commons alike. Of the sixty-three clauses of Magna Carta—the thirty-nineth and fortieth have been of lasting importance in the English constitution. The 39th and 40th Clauses run:—"No free man shall be taken or imprisoned, or dispossessed, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send upon him, unless by the lawful judgement of his peers, or by the law of the land", and "To none will we sell, to none will we deny or delay, right or Justice". In 1789 the National Assembly of France proclaimed the "Declaration of Man and of Citizens". In the early part of the 19th century "Bill of Rights" was embodied in the Constitution of the U.S.A.

The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on December 10, 1948 in its Paris Session with a view to recognising "the inherent dignity and of the equal and inalienable rights of all members of the human family" and to achieve "the promotion of Universal respect for and observance of human rights and fundamental freedoms". This Declaration is a strong moral weapon in the armoury of the United Nations which was brought into being "to reaffirm faith in the fundamental human right in the dignity and worth of human person, in the equal rights of men and women and of nations large and small....." Article 1(3) of the U. N. Charter lays down that the purposes of the United Nations are to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion." The UNESCO is also striving to promote through education respect for Human Rights throughout all nations.

Opinions of U. N. Leaders

The U. N. leaders hailed the Universal Declaration of Human Rights with high hopes on its first anniversary on December 10, 1949. Carlos P. Romulo of Philippines, the then President of the General Assembly, described the Declaration as "a tremendous and active force", which is the hope of millions of down-trodden people throughout the globe especially in Colonial countries of Asia and Africa. Mrs. Roosevelt, Chairman of the U. N. Human

Rights Commission, said that democracy "must prove that it has due consideration for the rights and freedoms of the individuals". Mr. Trygve Lie, the former Secretary-General of the U. N. said that this Declaration of Human Rights was "as public and alive as the eternal desire of the peoples of the world for peace and freedom."

The Declaration contains thirty Articles. We are reproducing below some of the articles. The Declaration affirms:

(i) that all "human beings are born free and equal in dignity" and "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood",

(ii) that everyone "is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status",

(iii) that everyone "has the right to life, liberty and security of person",

(iv) that no "one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,"

(v) that all "are equal before the law and are entitled without any discrimination to equal protection of law",

(vi) that no "one shall be subjected to arbitrary arrest, detention or exile",

(vii) that everyone "has the right to freedom of movement and residence within the border of each state",

(viii) that no "one shall be arbitrarily deprived of his property",

(ix) that everyone "has the right to freedom of peaceful assembly and association",

(x) that everyone "has the right to take part in the Government of his country, directly or through freely-chosen representatives",

(xi) that every one, "without any discrimination, has the right to equal pay for equal work",

(xii) that everyone "has the right to education" and Education "shall be free at least in the elementary and fundamental stages",

(xiii) that everyone "has the right to a standard of living adequate for the health and well-being of himself and of his family",

(xiv) that everyone "who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity",

(xv) that everyone "has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".

There is no sanction behind the Declaration. The Member countries of the U. N. pledged themselves to implement it. But it is a matter of regret that the Declaration is being observed in the breach. The people of Tunisia, Morocco, Togoland, Kenya, Union of South Africa, Rhodesia, Cameroon etc. in the African Continent, the people of Indo-China and Malaya in Asia and Negroes in the southern part of the U.S.A. are being denied human rights and liberties. Whenever the U.N. Discusses problems of human rights in certain countries, those countries remind the U. N. of its Charter that it has no right to interfere in the domestic affairs of the member-countries. Due to hostile attitude of such countries the U. N. cannot implement the Declaration.

Indian Constitution and Human Rights.

One unique feature of our Constitution is the enunciation of the most elaborate declaration of human rights hitherto framed by any state. The fundamental rights enumerated in the Constitution are rights to equality, to freedom of movement and of religion, to property and to contitutional remedies; rights against exploitation; and cultural and educational rights.

Article 17 of our constitution abolishes untouchability which was eating into the vitals of the society and its practice in any form is forbidden. Article 46, under the Directive

Principles, though unenforceable at a Court of Law, lays down that the State shall strive to promote the well-being of the back-ward classes and "shall protect them from social injustice and all forms of exploitation".

Negroes in the Southern U.S.A.

Though the rights to "life, liberty, and the pursuit of happiness" of all are recognised in the U.S.A., the Negroes upon whose labour the prosperity of the southern part of the U.S.A. stands are deprived of fundamental rights. Harold J. Laski wrote in his famous book. "The American Democracy", 1949: "Whatever be the small improvement made here and there in the treatment of the Negro, he is, in general, as ruthlessly exploited as the contempt and ingenuity of the South permit. He is exploited as citizen, as consumer, as producer". Thus there is no fundamental difference between the racial theories adopted in Nazi Germany and those adopted in Southern U.S.A. Brutality, terror, violence and exploitation have been let loose on the Negro community. The U.S.A. always protested against the diabolical treatment of Jews in Tsarist Russia and in Nazi Germany. But she should also be condemned for the same offence of racial discrimination in her own country.

Racial Policy of Malan Government

Another place of racial discrimination is the Union of South Africa. The Malan Government of South Africa is going ahead to implement its notorious racial segregation policy called "Aparthied" which has unanimously been condemned by the world press. Dr. Malan is repeatedly flouting the resolutions of the U. N. which ordered him to stop the segregation which is against the noble principles of the United Nations and of the Universal Declaration of Human Rights. Mr. W. T. Tsotsi, President of the All African Convention, said on December 17, 1950: "For non-Europeans, South Africa was always a Nazi or fascist state characterised by the Harrenvolk (Master people) ideology, with ruthless suppression of human rights and different systems of laws for the ruling and subject races. The coming into power of the Nationalist Party of Dr. Malan has emphasised the fascist nature of the South African State". The Group Areas Act, The Public Safety Act, The Suppression of Communism Act, The Criminal Law Amendment Act, The Pass Laws and the Native Urban Areas Act—all these are undemocratic and discriminatory. Apart from these there are "multifarious regulations" which also suppress fundamental human rights. The Malan Government could not have done so but for the backing and support of the imperialist powers of the West.

Racialism and Colonialism.

Racial antagonism and Colonialism are the two stumbling blocks on the path to equality and fraternity. To assess the worth of human being on the basis of racial superiority or inferiority is not compatible with our democratic civilisation. The civilised world should be ashamed of such kind of assessment of human beings "Lives are widened and enriched by international and inter-racial contracts and sympathies..... We should learn to care human beings as human beings without reference to the accidents that differentiate them from one another or from us. Brotherhood should be as wide as humanity."

The pattern of Colonial rule is the same everywhere whether in Asia or Africa. Suppression of liberty, exploitation of natural resources without any plan for conservation, oppression and repression are the concomitant evils of Colonial rule. The sorrow and sufferings of millions of people in the clutches of colonial octopus cannot be clothed in language. The complete liquidation of Colonialism and Imperialism from Asia and Africa and the adoption of the maxim "Live and let live" in national and international sphere are indispensable and imperative in order to ensure fundamental human rights and liberties and for the cessation of the age-old conflict of mankind. Let us confidently hope that the member countries of the United Nations who have pledged themselves to achieve promotion of and respect for human rights and liberties, will, discarding parochial out-look and selfish greed, implement the Universal Declaration of Human Rights and fulfil their pledge in the interests of world peace and Universal brotherhood.

THE JUDICIAL SYSTEM IN MODERN JAPAN

By
SRI RAM PADA DAS
(*Third Year Student*)

The first written Penal Code of Japan came into existence in as far back as the 7th Century. Near about the end of 19th Century, Civil Laws were codified and the old Penal Code was amended. This is a rather slow evolution for any legal system. But after the World War II, quick developments have taken place in the legal history of Japan. The writer delineates them against a historical background—[Editor].

It would not be inappropriate to have a glimpse of the Judicial System in Japan specially under the Meiji Constitution before a discussion of the changes in the judiciary after the World War II is ventured upon.

The Judicature under the Meiji Constitution

The Meiji Constitution of 1889 divided the Emperor's power into 3 parts — legislative, judicial & executive. In the year 1890, there were established for the adjudication of civil and criminal cases (a) the Suprame Court (*Tai-Shin-in*), (b) the Court of Appeal (*Kaso-in*), (c) the District Courts (*Chiho-Saiban-jo*) and the Local Courts (*Ku-Sibanjo*). The Jury system was adopted in 1928.

Penal System before and during the Meiji Rule.

The first written penal code was introduced in Japan under the Emperorship of Suiko in *620* A. D. Under the influence of the Chinese Penal Code 'TO' a new penal code was promulgated in *702* A. D. under the name of the *"Taiho Ritsuryo."* Five kinds of punishments were mentioned there: flogging, whipping, penal servitude, exile and death. Graver crimes were treason, blasphemy, undutifulness to one's parents, adultery etc. Confession by the accused was a necessary part of the procedure of a criminal suit and torture was recognised as an indispensable means of obtaining such confession. Several hundred years after the introduction of the *"Taiho Ritsuryo"* the succeeding—Shogunate Governments adopted extremely severe penal systems for the prevention of criminal offences. One of the most famous of them was the *'One hundred criminal regulations'*... issued by the Tokygawa Shogunate.

With the downfall of the Tokygawa Shogunate, Emperor Meiji abolished the system of intimidation and reformed the old penal code. Simultaneously with the codification of the civil laws under the advice of Monseiur Gustave Boisgonade, a well-known French Scholar of Jurisprudence, the new penal code and the criminal procedure code were enacted. During the period from 1884 to 1941 revisions were frequently made in the penal code.

New Judicial System

The Japanese Judiciary has undergone perhaps the most radical change after the World War II.

The first step taken along this line consisted of a series of emergency measures introduced on the basis of the Pottsdam declaration, which ordered among other things, the abrogation and immediate suspension of all provisions of all laws, ordinances and regulations, restricting the political, civil and religious liberties of the Japanese people.

The basic change, however, was effected when the new constitution came into force on May 3, 1947, to guarantee the enjoyment by

the people of all the fundamental human rights and providing for the full independence of judicial power, which is unequivocally vested "in a Supreme Court and in such inferior courts as are established by law."

Chapter VI of the new constitution contains the provision about judiciary. (Art. 76-82).

Art. 76 declares that judicial power is vested in a Supreme Court and in such inferior courts as are established by law. All Judges shall be independent in the expression of their Judgement and shall be bound by the constitutional laws.

Art. 77 vests the Supreme Court with rule-making power under which it determines the rules of procedure and of practice, administration of judicial affairs, etc. The supreme Court may delegate the power to make rules for inferior courts to such courts.

Art. 81 enacts that the Supreme Court is the last resort with power to determine the constitutionality of any law, order, regulation or official act.

Art. 79 deals with the composition of the Court and appointment of Supreme Court Judges.

The Supreme Court shall consist of a Chief Judge and such number of other Judges as may be determined by law. All such Judges, excepting the Chief Judge, shall be appointed by the Cabinet.

The para 2 of the same Article declares that the people have the power to review the appointment of Supreme Court Judges.

The Judges of the inferior courts shall be appointed from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten years with privilege of re-appointment until the time of their retirement fixed by law. In the old constitution once a judge was appointed, his tenure continued until his death or any other disabilities.

However, the judges can not be removed from their office, except by public impeachment or unless declared physically and mentally incompetent. (Art. 78). An Impeachment Court is set up from the members of both Houses for the purpose of examining those judges against whom removal procedure has been initiated.

Other Changes

(*a*) *Habeas Corpus Act.*

Under the present costitution no person is subject to deprivation of life or liberty, or to any other criminal penalty except according to the procedure provided for by law. In the old feudalistic System however, involuntary servitude of women and children had grown into familiar custom, so that anything like the Anglo-Saxon Writ of *Habeas Corpus* seemed alien to Japanese life. The *Habeas Corpus* Act went into action on July 30, 1948.

(*b*) *Abolition of the Ministry of Justice.*

Under the new circumstances brought about by the *"Judicial Supremacy"* provided for in the new constitution the Ministry of justice was abolished on February 15, 1948. The authority and responsibility of the Ministry were transferred to the Attorney-General's Office established on the following day. The Attorney-General sits in the Cabinet as a Minister of State serving as the Chief Legal Advisor to the Excutive Branch of the Government.

(*c*) *Overall revision of Civil and Criminal Codes.*

The Criminal Code was basically revised and the major revisions included the protection of human rights and freedom, liberalization of divorce laws and adultery provisions and the abolition of the provisions concerning lesse majesty.

Under the revised Civil Code, the centuries old "Family-System" was abolished, establishing thereby the essential equality of the sexes. The domestic Relations Court has been established to exercise jurisdiction in matters concerning matrimonial relations, guardianship and curatorship, support, inheritance, incompetency, property and other domestic relations.

However, the Judiciary does not interfere with the exercise of Executive power of the Cabinet or the Law-making operation of the Diet.

In conclusion it may be stated that though the American influence is manifest in the drafting of the present Japanese Constitution, nevertheless for Japan it has been a bold step in constitutional experiment.

BUREAUCRACY IN THE MODERN DEMOCRATIC STATE

By
SRI R. K. ANAND
(Second Year Student)

The character of the Services required of the members of the Civil Service is undergoing great changes. Newer functions of government are growing up requiring a more creative and positive approach on the part of the bureaucracy, for whose closer integration into the general body of the people the the writer is pleading here.—[Editor]

In any parliamentary democracy and particularly in the Welfare State the way how things are done by Government is almost as important as what are the things it does. The task in which the Civil Service was engaged hitherto was largely functions of a regulatory kind, that is to say, in controlling or regulating the activities of citizens, industry, labour and other groups. Relevant in this context are legislative enactments like the Factory Act, regulations of the Public Health Agencies, Shipping Acts, for the enforcement of which were provided courts or law both civil and criminal. The state, then, was mainly concerned in keeping the ring where private interests fought out to secure the best place. Now the position is entirely different and will continue to grow increasingly so as the Welfare State establishes itself. Progressive Governments to-day follow more active policies of community development and most of their approaches are relatively new and different from the control functions of the eighteenth and nineteenth centuries. In short, service functions, as distinct from control or regulatory functions, are the distinctive features of our age.

The newer functions of Government in bringing it into close touch with many aspects of public life are leading to a remarkable transformation in the work and needs of the Civil Service. Instead of merely trying to enforce regulations the Civil Service has now to formulate creative plans and do all manners of extremely difficult and complex jobs. A much more positive, creative and realistic approach than in the past is thus imperative. Indeed, such is the responsibility of the bureaucracy today that by the time matters reach the ministerial level there is usually little scope left for constructive amendment.

In free democracies it is bureaucracy's new role to address itself to an earnest and sympathetic study of the economic, social and psychological factors operating among citizens. This, indeed, is essential if the Civil Service is to be integrated into the general body of the people rather than remain as a body of exclusive and privileged officials who, lacking popular co-operation as they must, can only lead the administration to chaos and futility.

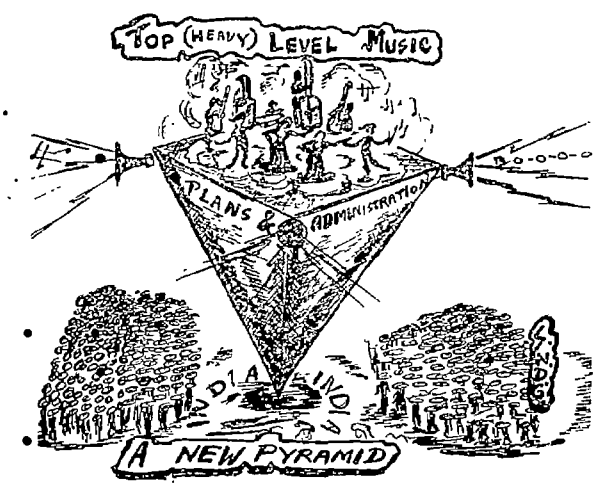
There unfortunately exists in our times a great deal of loose talk about bureaucracy. Bureaucracy—a body of paid, professional, permanent workers—is by itself a perfectly harmless instrument of state policy. Autocratic states may misuse it but that is no argument against the machine itself.

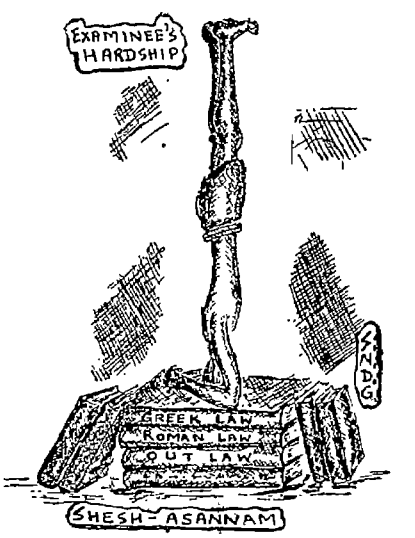
Books like 'The New Despotism,' 'Our Wonderland of Bureaucracy,' 'Bureaucracy Triumphant' are indications of the mounting fear and indignation at the increasing strength of bureaucracy. The commonest symptom of the malaise to which the civil service is liable is known when the admnistration turns wooden, inflexible and unadapted to the necessity of individual cases. This gives the impression that the means of administration are badly suited to the ends. The inability to distinguish between cases that are only superficially, not

intrinsically, similar (especially when it is remembered that the central headquarters seek for uniformity throughout in a large organ employing perhaps thousands of officials) has obvious drawbacks. It is very cheap but always tends to produce inflexibility since all the multitudinous problems of real life cannot be envisaged by the bureaucrat. To settle everything on the basis of rational discrimination would be excellent but far too expensive because that would make imperative the recruitment of better trained and more intelligent officers. It is evident, however, that when the idea of regarding each case on its merits is incorporated in the bureaucratic order much of its present inflexibility will be weaned away.

The theory of open competitive examinations for the Service is based on the assumption that people who pass higher up in an academic examination in any subject or group of subjects will necessarily be more capable than others who pass lower down. This idea is antiquated. There are now working tests not requiring specialised knowledge, and ministers in England are expressing great satisfaction over the young officials they are getting. This should not lead to nepotism and patronage or we should stick to the old method of open competitive examinations even though that is not so successful. A basic knowledge of the main social sciences is of course absolutely essential for the officer. There should be a comprehensive scheme—referring equally to the highest order of the bureaucracy as well as to the lowest—which involves, above all, some understanding between the governor and the governed. Everything should be done to break the isolation of the Civil Service, and this is particularly important in India where the Civil Service needs more thorough integration into the public frame. Much good work has been done towards this end, and the psychologilal considerations which motivated the substitution of the I.A.S. for the old I.C.S. were well grounded.

With the progress of democratic institutions and the dawning of a clearer comprehension of the real purposes of bureaucracy, much of the old rancour towards it will disappear. It is useless casting reflections on the integrity or good intentions of the service, for that would only serve to complicate matters. With better mutual understanding between the two, the relations between the bureaucracy and the common man in democracy can assuredly be shaped for the better.





Cartoons by: Sri Sudindra Narayan Dasgupta. (Third Year Student.)

NOTES OF THE SESSION

By
SRI S. HORE, M.A.
(Third Year Student)

The past year had been an eventful one. It had been a year of great constitutional conflicts, of good resolutions and of some solid achievements. The author of these Notes discusses the important landmarks amidst these conflicts, resolutions and achievements.—[Editor]

I

PREAMBLE

The 'rights' guaranteed by our Constitution shall have to be zealously guarded from interference from any quarter. Many a battle will have to be fought for establishing a healthy tradition, to keep the executive in check, to help administering justice and the lawyers must be in the forefront in fighting for the causes of the people for their democratic rights and interests.

It is gratifying to note that an 'Association of Democratic Lawyers' has been formed recently in West Bengal for the furtherance of the cause of the people in general. It is the state counterpart of the 'International Association of Democratic Lawyers' of which the eminent fighter for peoples' rights and liberties, Mr. D. N. Pritt, Q.C., is the president. It is hoped that the West Bengal branch of the said organisation will be able to keep high the lofty ideals for which it stands and the persons of the profession will muster strong behind the organisation to help maintain it fighting creed and to perform satisfactorily the sacred duties and responsibilities entrusted to it.

II

INTERPRETATION OF THE CONSTITUTION

Can a 'writ' be issued on a Chief Justice? Such a thing is a 'constitutional irony', observed Mr. Justice P. B. Mukerji of the Calcutta High Court, while delivering judgment on a 'remarkable' point of law.

The question arose at the hearing of a rule which had been obtained by Mr. P. K. Bose, a former Registrar of the Calcutta High Court in its original side, against the present Chief Justice. Mr. P. K. Bose was dismissed from service on September 3, 1951, by the then Chief Justice Sir Arthur Trevor Harries. Mr. Bose thereafter applied to the High Court requesting for an order under writ of *Certiorari* or writs of a like nature upon the present Chief Justice and also for an order directing the Chief Justice to desist from giving effect to or acting in any manner under the said order of September 3, 1951. Mr. Justice Bose who heard the ex-parte application had issued a rule and referred the matter to the present Chief Justice for the constitution of a special Bench to hear it. Mr. Justice Das, presiding over the Bench, discharged the 'rule'. Mr. Justice Mukerji concurring with the views expressed by

Mr. Justice Das made important observations on the constitutional points involved. His lordship observed that Bacon's proverbial sedate lions under the throne of Justice had disturbed their manes in a seeming thunder only to produce a constitutional irony. Fortunately, the Chief Justice had not chosen to complete the anomaly by appearing in person before his companion justices. The river of the constitution had tried to rise above its own source, and they had to sit in judgment to decide if it could do so.

Referring to the constitutional position with regard to the issue of writs under Art. 226 Mr. Justice Mukerji observed that a time had come to issue a grave warning and caution, because it had been contended that the words 'any person on authority' and 'directions', 'orders' or 'writs in the nature of' should be understood in an unqualified manner so that their only limit was the sky. This contention was entirely unsound juristically, constitutionally and practically. To assent to such a view would mean that in every case of contract a writ or an order would lie such as in the case of a cook being dismissed by a master. To accept that view would mean that there would be no jurisprudence left in this country, whether of contract or of tort or of crimes, and they would be left only with the misapplied Jurisprudence of the constitution sorely misconceived. This interpretation would destroy all Governments in the country, not only all executive and legislative actions but also all other courts and all other laws. Great power and trust had been reposed by the nation in the judiciary in Art. 227 of the constitution. As the trust was great the responsibility was greater. "I do not interpret the constitution to mean that the Final Government of this country is an exclusive Government by the Judiciary by inviting or entertaining litigation and by issue of any writ for any purpose', his lordship remarked. There was no constitutionally guaranteed 'Fundamental right' of a person to a public office. The public office had legal and such constitutional incidents as are contained in Art. 311, but that did not make it an object of 'Fundamental Rights' under Part III of the Constitution.

With regard to the issue of writ, it would be against the High Court itself. "Even in the lure and name of an unqualified judicial power under Art. 226 of the constitution I am unable to introduce such judicial tyranny and anarchy and reduce this High Court to a constitutional extravagance. Power cannot be allowed to overreach itself. If it is true of executive and legislative powers it is also true of judicial power. This court cannot be allowed to stultify itself by such a self-defeating process'. It would be reducing the independence of judicial administration to a mere shadow if persons in the employment of the High Court were held to be immune from the disciplinary and punitive powers of the court in case of misconduct, his lordhsip concluded. Mr. Justice Guha agreed.

Points decided: The Civil Services (classification, control and appeal) Rules, under Sec. 96 B of the Government of India Act, 1919, do not apply to the post of a Registrar of the High Court, Rules themselves, being 3 (a), 30, 52, exclude the Registrar from thir operation; no writ lies against the Chief Justice under Art. 226 of the Constitution; Art. 320 relating to public service commission does not apply to the Registrar of the High Court and the Chief Justice's power to appoint and dismiss officers of the High Court are not controlled by the civil services Rules in the constitution.

III

CONSTITUTIONAL CONFLICT— THE GREAT BATTLE.

Questions relating to the powers, privileges and rights of the Council of States and its relations with the House of the People were raised in the Council on April 29 last during a procedural debate on the "Income-Tax (amendment) Bill".

The Bill, as passed by the House of the People, had been certified by the Speaker as 'a money bill' under Art. 110 of the constitution. During the debate in the Council of States it was contended by some of the Hon'ble members that as doubt had arisen as to whether the 'Bill' under dissucssion was a 'money bill' or not, it may be referred back to the House of the People for further clarification on the point. The demand got further strength when the leader of the Council of States remarked that he was not sure whether the Speaker's certificate had been given after full consideration or only as a routine formality. Strong exception was taken by the House of the People to this remark of the Law Minister as amounting to aspersion on the Speaker and derogatory to the dignity of the House of the People. Sri Biswas was asked to appear before the 'Lower House' to explain his conduct. As a sequence the 'Upper House', of which Sri Biswas is a member, directed Sri Biswas through a resolution not to appear before the other House in connection with the same. An unprecedented event and an embarrasing situation unknown hitherto to the history of the present parliament cropped up.

There are two important constitutional points here to be decided. First, whether the 'Upper House' can question about the certification by the Speaker of any bill as 'money bill' and secondly, whether the 'Lower House' has the power to issue directives to a minister, who is not a member of that house, to appear and give explanation before the House for anything he said in the other House, where he is a member.

As regards the first point the answer is an emphatic 'no', by the authority of Art. 110 (3) of the constitution which runs as follows: "If any question arises whether a bill is a money bill or not, the decision of the Speaker of the House of the People thereon shall be final". But the second point is rather complex. The 'elders' took the stand, first, that the House in which a remark was made was the sole judge of its merits and that any such remark could not be subjected to judgement by the other House. This view seems to find support in Art. 105, clauses (1), (2) and (3) of the constitution, read with English parliamentary usage and Rule 159 of the Rules of procedure adopted under Art. 118 (2) of the constitution; Secondly both Houses enjoying an equal status, Sri Biswas could not be directed or even requested to go to the 'Lower House', of which he is not a member but to which he has access being a minister, to answer charges against him. If such a request was accepted then a harmful convention would arise which was derogatory to the prestige of the 'Upper House'.

But the members of the Lower house relied on Art. 75 (3) of the constitution which runs as follows: "The Council of ministers shall be collectively responsible to the House of the People". Whether "collective responsibility" can be made to cover the requirements of this particular case, where no collective issue concerning the council of ministers seems to be involved, is a matter which only a Bench of Constitutional experts can pronounce upon. But it appears from the facts that it is not, and it would certainly seem strange if the leader of the Council of States were responsible only to the House of the People. In this connection it may be suggested for, avoiding such future complication and for harmony between the two wings of the Parliament that Art. 88 of the constitution may be repealed or modified, so that ministers need no longer appear in both Houses, but every department will have a separate spokesman in them, as is the British practice.

IV

EXTENSION OF AUDITOR GENERAL'S TERM—A CONSTITUTIONAL POINT

The Constitutional battle on the competence of parliament to enact legislation extending the term of office of the present Comptroller and Auditor-General by

one year was raised in the Council of States on May 6 last, when the Finance Minister's bill "Comptroller and Auditor-General (conditions of service) Bill, 1953, was placed before the Council for assent. Diwan Chaman Lal contended that as a result of Art. 337 the term of office of the Auditor-General, which was due to expire on Aug. 15, 1953, could not be extended by law unless the constitution was amended. The Finance Minister, quoting the opinion of the Attorney-General, had said that Art. 377 only guaranteed that the conditions of service of the incumbent could not be changed to his disadvantage and he could not be removed from office earlier than his original period. Moreover, Art. 148 empowered Parliament to pass law fixing the term of office of the Auditor-General, and so long as it was not a reduction, it would apply to the present Auditor-General. This interpretation was challenged by many members who maintained that a plain reading of Art. 377 only showed that the term of office of the present incumbent would expire on August 15 next and could not be extended. The relevant portion of Art. 377 says, "...The Comptroller and Auditor-General of India...be entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him" (Art. 377). So it is apparent that there is no bar on the extension of his term though Art. 148 (4) precludes him for further office 'after he has ceased to hold his office'.

But the more interesting point in this connection is Art. 148 (3). The article enables parliament by law to reduce the term of office of the Auditor-General though he could be removed from his post ordinarily only like judges. The Auditor-General is the pivot round which the Financial structure of the Central Government moves. The entire responsibility to check executive extravagance and to keep it within the budgetary provisions lies on him. Naturally he may not be liked by the party in power. So Art. 148(3) should be amended in such a manner that the Auditor-General may be placed above the control of the executive Government. It is a happy augury that the Government is considering such a move.

V

BAR COMMITTEE'S REPORT

The All India Bar Committee, which was set up in 1951 with Mr. Justice S. R. Das of the Supreme Court as Chairman and seven other members, has submitted its report. The main provisions of the report are appended below:—Referring to the need for a unified Bar for the whole country the Committee says, "there can be no doubt that the establishment of an autonomous and unified All India Bar is an ideal which must be attained. A new Indian nation has been born in the process of historical unfolding. In the context of our newly won independence the urge for having a unified national Bar must necessarily have an irresistable attraction". Unless, therefore, there be any cogent and compelling reason against it, the establishment of a Unified National Bar can, in the opinion of the committee, be no longer put off.

Composition of Council: The Committee suggested that the All India Bar Council should consist of (a) two judges of the Supreme Court, who have been advocates, to be nominated by the Chief Justice of India; (b) The Attorney-General of India and the Solicitor-General of India as ex-officio members; (c) delegates from the State Bar Councils and (d) three members to be elected by the Supreme Court Bar Association from among themselves who should ordinarily be resident of Delhi State and practising in the Supreme Court. The All India Bar Council should maintain a common roll of advocates; prescribe qualifications for

admission and the fees; prescribe codes of professional conduct; and lay down standards of legal education and such other matters. The committee rules out the possibility of a separate Bar council for the Supreme Court.

Uniform Qualifications of Advocates Welcomed: The Committee has suggested that a person, for admission into the roll of advocates, must be in possession of a law degree after first having graduated in arts, science, or commerce. Thus engineering and medical graduates will be precluded from entering the legal profession. Such a person should also have undergone a further period of one year's legal apprenticeship and passed an apprenticeship examination.

For those who are studying law in U.K., the committee suggests that, after the expiry of a period of five years from a specified date, an English barrister should be enrolled only on a reciprocal basis between India and U.K. After the expiry of that period, the call to the bar should be taken, in the case of an Indian who studies law in U.K., "only as the equivalent of a law degree", provided the proposed committee of legal education of the All India Bar Council "is satisfied as to the sufficiency of the syllabus of the Inns of Court Law School"; such Indian Barristers will, however, have to pass the apprenticeship examination mentioned above. Existing Vakils and pleaders, who are law graduates as also pleaders who are not law graduates but are entitled to be enrolled as advocates should be entered as advocates in the registers to be maintained by the State and All India Councils. The rest of the existing pleaders, Mukhtears and agents should be allowed to continue practice as at present, but there should be no further recruitment of non-graduate pleaders, Mukhtears or revenue agents.

In a dissenting note, Bakshi Tek Chand, one of the members, differed from the findings in respect of the continuance of the dual system in Bombay and Calcutta and the right of any advocate on the common roll to appear in the Supreme Court.

VI

SUPPLEMENTARY NOTES

The All India Bar Committee further suggested that the translation of existing statutes and text books in the national language should be taken in hand at an early date. "The recommendations made by the committee will not be affected by the language problem. In order, however, that the national language may in course of time be introduced in all courts, the preparation of the translations of the existing statutes and text books should be taken in hand and in future Statutes should be passed in the national language".

The setting up of a commission to study and recommend measures to improve the existing system of jurisprudence in India has been recommended by Mr. C. C. Shah, M.P. Mr. Shah has said that there is a large volume of opinion in the country which felt that the present legal system is entirely foreign to the genius and traditions of the people who needed a "simpler, quicker and cheaper (if not an entirely free) system than the present dilatory and costly system". "More often than not, the delay and cost result in a denial of justice. There has been a persistent and growing demand for a radical change in the present system of the administration of justice. It is not a question of a few changes here and there. Considering the poverty and illiteracy of the vast majority of the people, we need a system suited to the condition in this country."

We associate ourselves with the views expressed by Mr. C. C. Shah in his supplementary note to the All India Bar committee report.

EVOLUTION OF LAW IN INDIA

By
SYED. MUSHTAQUE MURSHED.
(Second Year Student)

In spite of all its evils, the British undoubtedly bestowed on India a few benefits. Perhaps the most important of them has been the introduction of the English System of law and justice in this country. The writer here tells us how this introduction was effected—[Editor].

The present essay is confined to an exposition of the various phases in the development of Law in India from the conditions of chaos in which the Britishers found it.

We need not enter into the wholly irrelevant question as to whether or not British rule has been for the ultimate benefit of India; but I think we shall be wanting in graciousness if we did nos at this moment a debt to our erstwhile English rulers for bringing our law to the degree of progress in which we find it to-day; for it would be hard to deny that when British dominion was first established in this country, we were a community singularly deficient in the conception of social principles and duties. The law we practised—or rather that collection of crude principles which went under that name—was in a state of deplorable muddle. The personal law of the Hindus administered in all the wantonness of caprice by village courts of panchayats was lost in a maze of obscurity. Moreover, the commentaries of theologians forming the bulk of Hindu Law were clothed in terms at once so vague and ambiguous that it was impossible to draw any precise or legitimate conclusion from them. The Law of the Muslims on the other hand, though of a comparatively recent origin, having been developed between the 7th. and the 10th. centuries A.D. and therefore considerably more well defined, was essentially a code of medieval principles which rendered them palpably unsuitable for adoption to modern times. So much for the personal laws. As for the criminal law, both Hindus and Muslims were governed by the Islamic codes which, showing scant respect for human life and liberty, were either ruthless in their severity or else full of anomalies and absurdities; for instance, the common penalty for theft was amputation of the hands, but sons were made free to pardon the murderers of their parents.

There were then clear indications in 1772, when Warren Hastings was imported into this country, to be the Governor of Bengal, that drastic measures were needed to rescue a decaying legal system from its inevitable doom. To this task the Englishman addressed himself with a certain zeal and assiduity. Using the powers secured to the Company under the Diwanees he undertook upon himself the odium of laying the foundations of the legal system which with inconsiderable modifications survives even upto the present day. Following a vigorous policy of decentralization, he set up a number of district or mofussil courts under the judicial and administrative superintendence of two principal (Sadar) courts, exercising civil and criminal jurisdiction, which were also to be the ultimate courts of appeal. These were then all the Company's Courts. So far the wisdom of his policy can scarcely be doubted. But then intervention came from 'Home' when in pursuance of the provisions of the Regulating Act of 1773 a Supreme Court was set up in Calcutta with jurisdiction over its presidency area. While all these courts administered whatever little they could divine of the personal laws of the Hindus and the Muslims, the Supreme Court followed the highly technical rules of English procedure which could not profitably be applied amongst peoples unaccustomed to complex judicial processes.

With the judicial framework thus determined the question what law the various courts were to follow assumed a vastly increased importance. To impose forcibly the English system of justice upon a people untrained in its methods would be offending their religious and moral susceptibilities. The native laws on the other hand, as we have seen, did not lend themselves well to a proper administration of justice. One thing however was clear *viz.* that there could be no subsitute for the personal laws of the Hindus and Muslims which consequently had to be retained with such amendments and modifications as wisdom seemed to demand. Moreover, there was nothing in the nature of a law of procedure, either civil or criminal, no law of contract, no law of torts. The country lacked in fact a whole body of territorial laws. The problem of supplying this grave deficiency was indeed a complex one. Everything therefore pointed towards framing especially for India's needs a legal system which, without prejudicially affecting the authority of government, should be consonant to the ways and manners and inclinations of her people. The enactment of the Charter Act in 1833 was the first practical step towards the realization of this purpose. The first Law Commission that was set up in its implementation under the presidency of Lord Macaulay drafted the Indian Penal Code which however did not become law until 1860. This Commission also drew up a number of reports embodying proposals for legislation which were considered by the various Law Commissions which sat in England. On the basis of these reports the Code of Civil Procedure was drawn up in 1859 and the Code of Criminal Procedure in 1861. These Commissions were also responsible for the enactment of the Succession Act (1865), the Limitation Act (1871), the Evidence Act (1872), the Contract Act (1872), the Specific Relief Act (1877), the Negotiable Instruments Act (1881), the Trusts Act (1882), the Transfer of property Act (1882), and the Easements Act (1882).

Thus it would appear that by 1882 British India possessed a comprehensive system of codified territorial laws. The virtues of condification have been constantly called into question. The one persistent attack is that it leaves too little to judicial discretion and cannot be easily adapted to the changing phases of society. However excellent that argument may be and however excellent the English judicial system, the fact remians that regard being had to prevailing conditions, the Indian judiciary could not be safely modelled on English lines. For one thing it would not be able to afford the enormous expediture involved in the English system, and for another it would be absolutely fatal to entrust to the Indian bench, recruited for the most part at a very early age and possessing scanty knowledge of the law, any system which left the least room for discretion. Codification was the only expedient that left nothing to discretion and as such it was eminently suitable for the country's requirements. If it is an evil, it was inevitable.

As in other spheres, so also in legislation, moderation should be recognised as a cardinal virtue. The process of codification cannot be pushed too far without disastrous results. As Macaulay saw it, the aim of jurisprudence in India should be uniformity, where you can have it; diversity, where you must have it; but in all cases, certainty. Uniformity and certainty were achieved, so far as territorial laws were concerned, by codification. Where the bulk of the population consisted of Hindus and Muslims there was bound to be diversity in personal laws. As for Hindu Law, the labours involved in bringing its manifold diversities within a single code would be prodigious. As for Mohomedan Law though the difficulties might not be insurmountable, still orthodox Muslim opinion had to be reckoned with. It is inconceivable that orthodox Muslim sentiment would have tolerated with any show of complacency profane intrusions into their laws of Divine origin. Therefore in developing the personal laws of the Hindus and Muslims, the reformers fell back upon the time-honoured expedient of legal fiction thus achieving indirectly that which Indian public opinion would not have permitted them to do directly. But there is after all a limit to such a process and in certain matters it will not simply work. Glaring defects accordingly have had to be removed by direct legislation. Suttee was declared illegal in 1829. Infanticide was declared to be plain murder by the Act VIII of 1870. The Caste Disabilities Removal Act of 1850 went a long way towards

removing disabilities arising from change of religion and loss of caste in matters of inheritance and right to property. The Hindu Widow's Remarriage Act of 1856 legalized the remarriage of widows. These and similar other legislations, too numerous to recount, helped to reform the Hindu Law to a very large extent. Mohomedan Law on the other hand, having been only lately developed, was less capable of modification. Some latitude was however claimed in reforming the law of Gifts, Wills and Waqfs. But even here signs were not wanting to show that orthodox Muslim opinion would not long remain indifferent to this process of innovation if it were carried to vicious extremes. Consequently there has not been much interference with the Mohomedan Law either directly or indirectly. The only piece of legislation of any consequence is the Shariat Act passed as late as 1937 and its scope is limited to an indication of matters in which Muslims will be governed by their personal law *i.e.* Shariat.

Till the advent of the first Englishmen on Indian soil, one trait that was peculiar only to the Indian judicial system of panchayats and village courts, was a total absence of the legal profession. The various parties pleaded their own case before a tribunal that did not take into account any fine point of the law nor entered into any legal technicalities but gave its decision according to immemorial custom which it understood so well and which the people understood also. But with the progressive westernisation of the Law and the introduction of complex rules of procedure and evidence, an impartial administration of justice became a practical impossibility without the help of skilled legal practitioners. Thus one consequence of considerable sociological importance of the development of Law in India has been the creation of a legal profession which can indeed boast of having supplied the country with its leaders who ministered to it while a modern nation was in its birth pangs.

Another grave defect of the old order was a total absense of what we in our time have come to learn as the Rule of Law. We would indeed find it difficult to contemplate the horrors of a system under which "justice" was dispensed according to status. Now, indeed, we can look back upon times gone by and say with a sigh of relief: "Gone are the days when there was one law for the rich and one for the poor."

"A person whose duty it is to convey information to others does not discharge that duty by simply giving them so much information as is calculated to induce them, or some of them, to ask for more. Information and means of information are by no means equivalent terms."

Lindley, L. J. (*L. R.* 1895, 173)

* * *

The prosperity and greatness of empires ever depended, and ever must depend, upon the use their inhabitants make of their reason in devising wise laws, and the spirit and virtue with which they watch over their just execution: and it is impious to suppose that men, who have made no provision for their own happiness or security in their attention to their government, are to be saved by the interposition of Heaven in turning the hearts of their tyrants to protect them.

Lord Erskine.

MIMANSA RULES OF INTERPRETATION

By

AVINAS CHANDRA GUHA, M.A., B.L.

*Late Prof. of Hindu & Constitutional Laws, University Law College, Calcutta.**

Mimansa rules of Interpretation are given below :—

The Vedas

Mantra	Brahmana
	1. Vidhi 2. Nishedha 3. Arthavada 4. Namadheya

I. VIDHI (अज्ञातार्थज्ञापको वेदभागो विधिः ।)

APURVA-VIDHI	NIYAMA-VIDHI	PARISANKHYA-VIDHI
(प्रमाणान्तरेणाप्राप्तस्य प्रापको विधिरपूर्व्वविधिः ।)	(पक्षेऽप्राप्तस्य प्रापको विधिर्नियमविधिः ।)	(उभयोश्च युगपत् प्राप्ते इतर व्यावृत्तिपरो विधिः परिसंख्याविधिः ।)

PARISANKHYA

श्रौती	लाक्षणिकी
(E. g., अत्र ह्येवारयन्ति— excluding other *stotras* than the *pavamana* by the particle *eva*).	(E. g., पञ्च पञ्चनखा भक्ष्याः । This is त्रिदूषणा—श्रुतार्थस्य परित्यागादश्रुताथ प्रकल्पनात् । प्राप्तस्य बाधादित्येवं परिसंख्या त्रिदूषणा ।)[1]

किञ्च भ्रात्रादिधने तन्मरणात् तन्मरणकालीनजीवनाद्वा भ्रात्रन्तरादेः स्वत्वमकामेनापि वाच्यम् । अत ऊर्द्ध्वं पितुश्चेत्यादि तत्कालीनस्वत्वज्ञापनार्थं तदानीमेव चेच्छाप्राप्तं विभागमनुवदति प्राप्तत्वात् विधानानुपपत्तेः । न च नियमः संभवति एवं सह वसेयुर्व्वा पृथग्वा धर्म्मकाम्ययेति मनुविरोधात् । दृष्टार्थत्वाच्च विभागस्य न तन्नियमः कालनियमो वा सम्भवति । किञ्च पितर्य्युपरत इत्यनन्तरकाल एव

* Lectures delivered on Hindu Law, 1926—1927, a portion. By courtesy of Sri Dvijendra Nath Guha.

[1] Vide Medhatithi and Kulluka on Manu III, 45 ; see also Bhattapada cited in Prayaschitta—Tattva of Raghunandana, and Madhava of Jaiminiya Nyayamalavistara.

विभागः स्यात् न तु परस्तादपि जातेष्टिवत् जातप्राणवियोगापत्तिसमानस्यात्र विरोधस्याभावात् पित्रु परमानन्तरस्य यावज्जीवपर्य्यन्तस्य स्वेच्छात एव प्राप्तत्वात्। अतो जीवति पितरि सत्यपि पुत्राणां स्वाम्ये विभागनिषेधार्थं मनुवचनं वाच्यम्। तच्चान्याय्यम्। अस्वार्थपरत्वापत्तेः। *Dayabh.*[1]

APURVA-VIDHI

UTPATTI-VIDHI (i)	VINIYOGA-VIDHI (ii)	PRAYOGA-VIDHI (iii)
(कर्मस्वरूपमात्रबोधको विधि-रुत्पत्तिविधिः।)	(अङ्गप्रधानभावबोधको विधि-र्विनियोगविधिः।)	(प्रयोगप्राशुभावबोधको विधि-रङ्गानां क्रमबोधको विधिर्वा प्रयोगविधिः।)
		ADHIKARA-VIDHI (iv) (कर्मजन्यफलस्वाम्यबोधको विधिरधिकारविधिः।)

(2) VINIYOGA-VIDHI (प्रधान of 2 kinds : प्रकृति & विकृति, e. g., सौर्य।)

Its 6 *criteria* or tests (each being more potent than that or those following) :—

1. श्रुति (Express text ; e. g., दध्ना जुहोति, व्रीहिभिर्यजेत, अरुणया पिङ्गक्ष्यैकहायण, गवा सोमं क्रीणाति, व्रीहीन् प्रोक्षति।)

श्रुति

विधात्री (e. g., लिङादि।)	अभिधात्री (e. g., व्रीह्यादि।)	विनियोक्त्री
विभक्तिरूपा (e. g., व्रीहिभिर्यजेत, अरुणया, etc., व्रीहीन् प्रोक्षति।)	एकाभिधानरूपा (e. g., पशुना यजेत। Here एकत्वपुंस्त्वे or यजेत। Here आख्याताभिहितसंख्ययो आर्थभावनाङ्गत्वम्।)	एकपदरूपा (e. g., यजेः। Here आख्याताभिहितसंख्ययो यागाङ्गत्वम्।)

श्रुति > लिङ्ग (ऐन्द्र्या गार्हपत्यमुपतिष्ठते।)

2. लिङ्ग (शब्दसामर्थ्यं लिङ्गं सामर्थ्यं रुढ़िरेव—e. g., वर्हिर्देवसदनं दामि इति मन्त्रस्य कुशलवनाङ्गत्वं न तूलपलवनाङ्गत्वम्।)

लिङ्ग > वाक्य (स्योनं ते सदनं कृणोमि घृतस्य धारया सुशेवं कल्पयामि। तस्मिन् सीदाऽमृते प्रातीतिष्ठ व्रीहीणां मेध सुमनस्यमानः॥)

[1] With the commentary of Srikrishna Tarkalankara. Ed. by Chandi Charan Smritibhusana. 3rd Edition, Calcutta, 1329 B. S., pp. 24-27.

3. वाक्य (समभिव्याहारो वाक्यम्—e. g., यस्य पर्णमयी जुहूर्भवति न स पापं श्लोकं शृणोति। अत्र पर्णताजुह्वोः समभिव्याहारादेव पर्णताया जुह्वङ्गत्वम्।)

वाक्य > प्रकरण (अग्नीषोमाविदं हविराजुषेतामवीवृधेतां महोज्यायोऽक्राताम्। इन्द्राग्नी इदं हविः, etc., इन्द्राग्नी इदं हविरित्यादेरेकवाक्यत्वाद्दर्शाङ्गत्वं न तु प्रकरणाद्दर्शपूर्णमासाङ्गत्वम्। In दर्श, इन्द्राग्नीदर्श-पूर्ण, अग्नीषोमौ।)

4. प्रकरण (उभयाकांक्षा प्रकरणम्। यथा, प्रयाजादिषु समिधो यजतीत्यादौ वाक्ये फलविशेषस्या-निर्देशाद् दर्शपूर्णमासवाक्येऽपि कथम्भावाकांक्षाया असुपशमात् प्रयाजादीनां दर्शपूर्णमासाङ्गत्वम्।)

महाप्रकरण	अवान्तरप्रकरण
(मुख्यभावनासम्बन्ध।)	(अङ्गभावनासम्बन्ध।)

प्रकरण > स्थान (अक्षैर्दीव्यति राजन्यमिति देवनादयो धर्मा अभिषेचनीयसन्निधौ पठिता अपि स्थानान्न तदङ्गं किन्तु प्रकरणाद्राजसूयाङ्गम्।)

5. स्थान or क्रम (देशसामान्यं स्थानम्।)

पाठसादेश्य	अनुष्ठानसादेश्य
	(पशुधर्माणामुपाकरणपर्याग्निकरण यूपनियोजनानामग्नीषोमीयार्थत्वमनुष्ठानसादेश्यात्। औपवसथ्येह्नि अग्नीषोमीयः पशुरनुष्ठीयते तस्मिन्नेव दिने ते धर्माः पर्य्यन्त ज्योतिष्टोमे त्रयः पशुयागाः। अग्नीषोमीयः सवनीय आनुबन्ध्यश्चेति। ते च भिन्नदेशाः। अग्नी औपवसथ्येऽह्नि सवं सुत्याकाले आनुं अन्ते।)

पाठसादेश्य

सन्निधिपाठ	यथासंख्यपाठ
(e. g., आमनहोमाः वैश्वदेवीं सांग्रहणीं निर्वपेत् ग्रामकामः। आमनदेवा इति तिस्र आहुतिर्जुहोति।)	(ऐन्द्राग्नमेकादशकपालं निर्वपेत्। वैश्वानरं द्वादशकपालं निर्वपेत्। इत्येवं क्रमविहितेषु इन्द्राग्नी रोचनादिक इत्यादीनां याजानुवाक्यामन्त्राणां यथासंख्यं प्रथमस्य प्रथमं द्वितीयस्य द्वितीयमित्येवं रूपो विनियोगः।)

स्थान > समाख्या (शुन्धध्वं दैव्याय कर्मणे । This mantra is सान्नाय्यपात्राङ्ग by virtue of पाठसादेश्य & not पुरोडाशपात्राङ्ग by virtue of the *samakhya* पौरोडाशिकम् ।)

6. समाख्या (यौगिकः शब्दः ।)

वैदिकी (होतुश्चमसभक्षणाङ्गत्वं होतृचमस इति वैदिकसमाख्यया ।)	लौकिकी (अध्वर्योस्ततत्पदार्थाङ्गत्वं लोकिक्या आध्वर्यवमिति समाख्यया ।)

Prakriti—यत्र समग्राङ्गोपदेशः । यथा, दर्शपूर्णमासादिः ।

Vikriti—यत्र न समग्राङ्गोपदेशः । यथा, सौर्य्यादिः ।

Atidesa—प्रकृतिर्वाद्विकृतिः कर्त्तव्या । अन्यत्रैव प्रणीतायाः कृत्स्नाया धर्मसन्ततेः । अन्यत्र कार्य्यतः प्राप्तिरतिदेशोऽभिधीयते । प्राकृतात् कर्मणो यस्मात्तत्समानेषु कर्मसु । धर्मप्रवेशो येन स्यात् सोऽतिदेश इति स्मृतः । *Madhava, J. Nyayamalavistara*[1] अतिदिष्टपदार्थस्य रूपान्तर-मूहनम्·····बाधस्तु पदार्थनिवृत्तिः ·····। *Madhava.* अनारभ्यविधिः—सामान्यविधिः ।

ANGAS

सिद्धरूपाणि (e. g., जाति, द्रव्य, संख्या, etc.—all दृष्टार्थानि ।)	क्रियारूपाणि

गुणकर्माणि or सन्निपत्योपकारकानि or आश्रयि कर्माणि (कर्म्माङ्गद्रव्योद्देशेन विधीयमानानि, e. g., अवघात, प्रोक्षण, etc.)	प्रधान कर्माणि or आरादूपकारकानि (द्रव्याद्यनुद्दिश्यके बलं विधीयमानानि कर्माणि । तानि च परमापूर्वोत्पत्तावेन उपयुज्यन्ते ।)

(1) दृष्टार्थानि e. g., अवघात, etc.	(2) अदृष्टार्थानि e. g., प्रोक्षण, etc.	(3) दृष्टादृष्टार्थानि e. g., पशु, पुरोडाश, etc. (तद्द्रव्यत्यागाशेनैव अदृष्टं देवतोद्देशेन च देवतास्मरणं दृष्टं करोति ।)

[1] Edited with his own commentary—Anandasrama Sanskrit Series, No. 24, Poona, 1892, pp. 374,479,121,179.

अष्टका पार्व्वणः श्राद्धं श्रावण्याग्रहायणी चैत्र्याश्वयुजीति सप्तपाकयज्ञसंस्थाः—Gaut. Dh.—s. ; VIII, 19 ; [1]

अग्न्याधेयमग्निहोत्रं दर्शपूर्णमासावाग्रयणं चातुर्मास्यानि निरूढ़पशुबन्धः सौत्रामणीति सप्तहविर्यज्ञसंस्थाः—Do., Do., VIII, 20 ;

अग्निष्टोमोऽत्यग्निष्टोमउक्थ्यः षोड़शी वाजपेयोऽतिरात्र आप्तोर्याम इति सप्तसोमसंस्थाः—Do., Do., VIII, 21.

(3) PRAYOGA-VIDHI

Its 6 *criteria* :

1. श्रुति (केवलक्रमपर & क्रमविशिष्टपर ।)
2. अर्थ (यत्र प्रयोजनवशेन क्रमनिर्णयः सोऽर्थक्रमः । यथाऽग्निहोत्रं जुहोति यवागूं पचति ।)
3. पाठ (पदार्थबोधकवाक्यानां क्रमः पाठक्रमः । of 2 kinds—मन्त्रपाठ & ब्राह्मणपाठ ।)
4. स्थान (स्थानं नामोपस्थितिः । यस्य हि देशे योऽनुष्ठीयते तत्पूर्वतने पदार्थे कृते स एव पूर्वमुपस्थितो भवति इति युक्तं तस्य प्रथममनुष्ठानम् ।)
5. मुख्य (प्रधानक्रमेण योऽङ्गानां क्रमः स मुख्यक्रमः । यथा, प्रयाजशेषेणा दौ आग्नेय हविषोऽभिघारणं पश्चादैन्द्रस्य दध्नः आग्नेयैन्द्र्यागयोः पौर्वापर्य्यात् ।)
6. प्रवृत्ति (सह प्रयुज्यमानेषु प्रधानेषु सन्निपातिनामङ्गानामावृत्त्याऽनुष्ठाने कर्त्तव्ये द्वितीयादिपदार्थानां प्रथमानुष्ठितपदार्थात् यः क्रमः स प्रवृत्तिक्रमः ।)

(4) ADHIKARA-VIDHI

Karma

नित्य	काम्य	नैमित्तिक
(नित्यं सदा यावद्वायुर्ण कदाचिदतिक्रमेत् । उपेत्यातिक्रमे दोष-श्रुतेरत्याग दर्शणात् । फलाश्रुते वीप्सया च तन्नित्यमिति कीर्त्तितम् ॥ —एकादशीतत्त्वधृतम् ।)[2]		(e. g., यस्याहिताग्नेरग्निर्गृहान्दहेत् सोऽग्नये क्षामवतेऽष्टाकपालं निर्वपेत् ।)

II. NISEDHA OR PRATISEDHA

प्राधान्यं तु विधेर्यत्र प्रतिषेधेऽप्रधानता । पर्य्युदासः स विज्ञेयो यत्रोत्तरपदेन नञ् ॥

[1] With the vritti of Haradatta - Anandasrama Sanskrit Series, No. 61, Poona, 1910, pp. 54-55.

[2] Ed. Jivananda Vidyasagara, Smritittattva, Vol. II, 2nd Edition, Calcutta, 1895, p. 23.

अप्राधान्यं विधेर्यत्र प्रतिषेधे प्रधानता। प्रसज्यप्रतिषेधोऽसौ क्रियया सह यत्र नञ्॥
—Cit. *Raghunandana*, मलमासतत्त्वम्।[1]

(1) प्रतिषेध—e. g., न कलञ्जं भक्षयितव्यं न लशुनं न गृञ्जनम्। *Jaim.* 6, 2, 19-20.

(2) पर्य्युदास
- (i) तस्य व्रतमित्युपक्रमः। e. g., नेक्षेतोद्यन्तमादित्यम्। *Jaim.* 4, 1, 3-6 ; see also 6, 2, 19-20.
- (ii) विकल्पप्रसक्तिः। e. g., ओ श्रावयेति चतुरक्षरमस्तु श्रौषडिति चतुरक्षरं यजोद्व्यक्षरं ये यजामह इति पञ्चाक्षरं द्व्यक्षरो वषट्कार एष वै प्रजापतिः सप्तदशो यज्ञेष्वन्वायत्तः (*vv.ll.*, एष वै सप्तदशः प्रजापतिर्यज्ञः मन्वायत्तः।) ततो नानुयाजेषु ये यजामहं करोति। *Jaim.* 10, 8, 1-4.

(3) अर्थवाद—e. g., दर्शपूर्णमासयोराज्यभागौ प्रकृत्य। न तौ पशौ करोति न सोमे। *Jaim.* 10, 8, 5.

(4) विकल्प—e. g., अतिरात्रे षोडशिनं गृह्णाति नातिरात्रे षोडशिनं गृह्णाति। *Jaim.* 10, 8, 6.

III. ARTHAVADA

Vidhi-sesa	Nisedha-sesa
(e. g., वायव्यं श्वेतमालभेत भूतिकामः। वायुर्वै क्षेपिष्ठा देवता वायुमेव स्वेनभागधेयेनोपधावति स एवैनं भूतिं गमयति।)	e. g., तस्माद्बर्हिषि रजतं न देयम्। सोऽरोदीत् यदरोदीत्तद्रुदस्य रुद्रत्वम्। तस्य यदश्रु अशीर्षत यो बर्हिषि रजतं ददाति पुराऽस्य संवत्सराद् गृहे रोदनं भवति।)

ARTHAVADA

गुणवाद	अनुवाद	भूतार्थवाद
(प्रमाणान्तरविरोधे सत्यर्थवादो गुणवादः। यथाऽऽदित्यो यूप इत्यादिः।)	(प्रमाणान्तरावगतार्थ बोधकोऽनुवादः। यथाऽग्निर्हिमस्य भेषजमिति।)	(प्रमाणान्तरविरोध तत् प्राप्तिरहितार्थ बोधको भूतार्थवादः। यथा, इन्द्रो वृत्राय वज्रमुदयच्छत्।)

विरोधे गुणवादः स्यादनुवादोऽवधारिते। भूतार्थवादस्तद्धानादर्थवादस्त्रिधा मतः॥
असति प्रसङ्गे प्रतिषेधो नित्यानुवाद इति भाष्यम्।

[1] Ed. Venimadhava De. Astavinsati Tattvam, 2nd Edition, Calcutta, 1314 B.S., p. 349.

1. *Positive* Injunctions including one with a *parjudasa.*

I. Every injunction in a positive form is either a *vidhi* or a *niyama* or a parisankhya or a mere *anuvada.* The following कारिका gives the definitions of these terms :—

"विधिरत्यन्तमप्राप्तौ नियमः पाक्षिके सति । तत्र चान्यत्र च प्राप्तौ परिसंख्येति गीयते ॥"

(तिथितत्त्वधृतम्) [1]

Parisankhya to be avoided by all means. Dr. Bhattacharyya's [2] division of *anuvadas* into (i) necessary & (ii) unnecessary – suggested by Srikrishna's "सप्रयोजनतथाऽनुवादो न दोषाय" with ref. to Jimutavahana's examination of Manu's text ऊर्द्ध्वं पितुश्च मातुश्च &c. (IX, 104)—Is it supported by the Mimansa doctrine of *arthavadas ?*

II. Difference between mandatory & recommendatory injunctions :

(1) Mandatory-prescribing { (i) *nitya* acts (including most *angas* open *kamya* acts), (ii) *naimittika* acts.

(2) Recommendatory—,, { (i) *kamya* acts, (ii) विकल्प or optional acts (व्रीहिभिर्यजेत यवैर्यजेत).

(3) Both mandatory & recommendatory—prescribing an act, which is at once *nitya* & kamya : संयोगपृथक्त्वाधिकरणम्, *Jaim.* 4, 3, 5-7. खादिरे बध्नाति । खादिरं वीर्यकामस्य यूपं कुर्यात् ॥ दध्ना जुहोति । दध्नोन्द्रियकामस्य जुहुयात् । *Sabara* : तस्माद्यदेव नैमित्तिकं तदेव नित्यार्थमिति ।

2. NEGATIVE injunctions

Mandatory	Recommendatory
(प्रतिषेधः न कलञ्जं भक्षयेत् । दीक्षितो न ददाति न जुहोति ।)	(विकल्पः अतिरात्रे षोड़शिनं गृह्णाति । नातिरात्रे षोड़शिनं गृह्णाति । उदिते जुहोति । अनुदिते जुहोति ।)

[1] Ed. Venimadhava De, Astavinsati Tattvam, 2nd Edition, Calcutta, 1314 B S., p 43.

[2] Vide Jogendra Nath Bhattacharyya, Smartasiromani, M. A., D. L., Commentaries on Hindu Law, Third Edition, Revised and Enlarged, Calcutta, 1909, pp. 117-118.

3. Optional Acts (विकल्प ।)

Principal (i. e. प्रधान acts)	Subsidiary (i. e. अङ्ग acts)
KAMYA acts	
In the case of व्रीहिभिर्यजेत यवैर्यजेत, where the purpose is apparent (viz., the preparation of पुरोडाश), and either material would serve that purpose. Where, however, the purpose is *not* apparent, (as, e. g:, in the case of आघारमाघारयति । सन्ततमाघारयति । ऊर्द्ध्वमाघारयति ।) There is *no* option.	In the case of अतिरात्रे षोड़शिनं गृह्णाति, नाति रात्रे, etc.

4. A विकल्प is to be avoided where possible, for it gives rise to 8 difficulties :

प्रमाणत्वाप्रमाणत्वपरित्याग प्रकल्पनात् । तदुज्जीवनहानाभ्यां प्रत्येकमष्टदोषता ॥

—Cit. *Raghun.*, एकादशीतत्त्वम् । [1]

(प्रतीतयवप्रामाण्यपरित्यागः । अप्रतीतयवाप्रामाण्य कल्पनम् । परित्यक्त यवप्रामाण्योज्जीवनम् । स्वीकृतयवाप्रामाण्यहानिरिति चत्वारो दोषाः । एवं व्रीहावपि चत्वारः ।)

5. An exception to the व्रीहियव rule :

An express text will bar a rule of अतिदेश । Thus, पशुकामेनानुष्ठेये सौमापौष्णे पशौ श्रूयते औदुम्बरो यूपो भवतीति । Here, the औदुम्बर will supersede the खादिर । *Jaim.* 10, 7, 61-63.

6. An exception to the अतिरात्रे नातिरात्रे rule :

An express prohibition will bar a rule of अतिदेश । Thus, one of the *angas* of the दर्श & the पौर्णमासि is the आज्यभाग । There is a काम्येष्टि called पशुयाग, which is a विकृति of दर्श & पौर्णम् । Now, in पशुयाग there is this text, referring to the आज्यभाग—न तौ पशौ करोति न सोमे ? This bars the आज्यभाग in पशुयाग—? See *Jaim.* X, 8, 5.

[1] Ed. Venimadhava De, Astavinsati Tattvam, 2nd Edition, Calcutta, 1314 B. S., p. 544.

7. विधिवन्निगदाधिकरणम्। *Jaim.* 1,2 19-25.

औदुम्बरो यूपो भवत्यूर्वा औदुम्बर ऊक पशव ऊर्जं ऊर्जं पशूनाप्नोति ऊर्जोऽवरुध्या इति।

8. हेतुवन्निगदाधिकरणम्। *Jaim.* 1, 2, 26-30.

शूर्पेण जुहोति। तेन ह्यन्नं क्रियते।

9. होलाकाधिकरणम्। *Jaim.* 1, 2, 15-23.[1]

होलाकादयः प्राच्यैरेव कर्त्तव्या आह्वीनैवृकादयोदाक्षिणात्यैरेव उद्वृषभयज्ञादय उदीच्यैरेव।

I. Meaning of a *positive* injunction *(vidhi)* :

Meaning of—

(1) the verb ; (2) the verbal flexions in general ; and

(3) the flexions of the optative *(lin)* & subjunctive *(let)* moods in particular (occasionally, however, the imperative mood & the gerundive are also used).

II. Meaning of a *negative* injunction or prohibition *(pratisedha* or *nisedha) :*

The particle of negation is taken with the flexion of the opt., subj., or imp. mood, or with the suffix of the gerundive (as the case may be), *as such.*

The result is that, while the pos. injunction impels or urges, the neg. injunction repels, holds back, prohibits.

III. A neg. inj. may prohibit an act—

(1) dictated by our natural impulses ; or

(2) dictated by a pos. inj. ; or

(3) dictated by neither.

IV. Prohibition of acts dictated by our natural impulses : No difficulty.

Ex. न क्रलञ्जं भक्षयेन्न लशुनं न गृञ्जनम्।

यत्र तु न विकल्पः प्राप्तिश्च रागत एव प्रतिषेधश्च पुरुषार्थस्तत्र प्रतिषिध्यमानस्यानर्थहेतुत्वम्। यथा, न कलञ्जं भक्षयेदित्यादौ कलञ्जभक्षणादेः तत्र कलञ्जभक्षणनिषेधस्यैव पुरुषार्थत्वात्।

Laugaksibhaskara, Arthasangraha[2]

V. Prohibition of an act, dictated neither by our natural impulses nor by a pos. inj. (called a *nityanuvada*) : it has no binding force at all.

VI. Prohib. of an act dictated by a pos. inj. :

Conflict bet. a pos. & a neg. inj. relating to the same matter.

---

[1] For the application of this होलाकाधिकरणम् or rule of interpretation, see Dayabhaga II, 40, and VI, i, 22.

[2] Edited with the commentary of Pandit Pramatha Natha Tarkabhusana, Calcutta, 1899, pp. 106–107.

Result: Both injs. become optional for, both having equal authority, one can't override the other.

Now, when that is the case, each of the injunctions must be held to lose its authority since it may be disobeyed & the other followed instead.

How is this result to be avoided ?—

By taking the neg. particle not with the flexion of the opt. &c. *as such,* but with some other possible term in the inj. (*parjudasa*).

Parjudasa = lit. throwing up; thus, exclusion, exception.

Result: An injunction of an affirmative character with the neg. inj. now appearing in it as an exceptional clause.

Deal with the texts of *Vasistha & Saunaka.*

VII. The reconstituted pos. inj. does not extend to the exceptional clause : The latter lies outside the scope of the former.

There is thus no inj., pos. or neg., with reference to the exceptional clause.

Deal with *Vas.* & *Saun.* again.

How to explain न स्त्री दद्यात् प्रतिगृह्णीयाद्वाऽन्यत्रानुज्ञानाद् भर्तुः [1] ?—

Three props. :

(1) A parent *shall* be competent to give etc.

(2) A mother shall *not* be competent to give etc.

(3) An *authorized* mother *shall* be competent to give etc.

(1) & (2) = A parent, other than a mother, shall be competent to give etc.

∴ A mother may or may not give etc.

Now, the effect of (3) upon this prop. is that (3) operates as an *adhikaravidhi :*

When a mother *may* give etc. she may do so only if she is authorized.

VIII. But when the act, relegated to the exceptional clause, is denounced by a separate and independent text or a penance prescribed in case of its commission, the orig. prohibition is re-established : there are thus, in such cases, both a *parjudasa* & a *pratisedha* & the difficulty caused thereby in the shape of what they call a *vakyabheda* [2] is ignored.

Examples :

(1) उद्वहेत द्विजो भार्यां सवर्णां लक्षणान्विताम्। *Manu* III, 4.

न सगोत्रां न समान प्रवरां भार्यां विन्देत। *Vishnu.*

---

[1] Dattaka Chandrika with the commentary of Madhusudana Smritiratna, p. 12.

[2] Admitting the existence of two or more rules where they can all be included in a single one —Dr. Bhattacharyya.

सगोत्रां समानार्षेयीं विवाह्य चान्द्रायणं
चरेत् परित्यज्य चैनां बिभृयात्। *Apastamva.*

(2) ऋतुकालाभिगमनं कुर्यात् पर्वणि वर्जयेत्। *Vrihaspati.*
ऋतुकालाभिगामी स्यात् स्वदारनिरतः सदा।
पर्ववर्जं व्रजेच्चैनां तद्व्रतो रतिकाम्यया॥ *Manu* III, 45.
षोड़शर्तुर्निशाः स्त्रीणां तस्मिन् युग्मासु संविशेत्।
ब्रह्मचर्यैव पर्वाण्याद्याश्चतस्रश्च वर्जयेत्॥ *Yaj.*
(Here the texts themselves effect the necessary *parjudasa*)
अतएव ऋतुकालाभिगमनम्……
वर्जयेदिति बृहस्पतिना पर्य्युदासे कृतेऽपि।
चतुर्दश्यष्टमी चैव अमावास्या च पूर्णिमा।
पर्वाण्येतानि राजेन्द्र रविसंक्रान्तिरेव च।
स्त्रीतैलमांससंभोगी पर्वस्वेतेषु यो नरः॥
विण्मूत्रभोजनं नाम प्रयाति नरकं मृतः॥
इति विष्णुपुराणे निन्दया।
वेदोदितानां नित्यानां कर्मणां समतिक्रमे।
स्नातकव्रतलोपे च प्रायश्चित्तमभोजनम्॥
इति मनूक्तेन च यथाक्रमं
रागप्राप्तगमननिषेधः प्रायश्चित्तं च संगच्छते।
अन्यथा तदुभयं न स्यात्।

Raghun., मलमासतत्त्वम्[1]

(3) नवोदके नवान्ने च गृहप्रच्छादने तथा।
पितरः स्पृहयन्त्यन्नमष्टकासु मघासु च॥ *Satatapa.*
अमावास्यास्विस्रोऽष्टका माघी प्रौष्ठ पद्यूर्ध्वं
कृष्णत्रयोदशी व्रीहियवपाकौ च।
एतांस्तु श्राद्धकालान् वै नित्यानाह प्रजापतिः।
श्राद्धमेतेष्वकुर्वाणो नरकं प्रतिपद्यते॥ *Vishnu.*
पौषे चैत्रे कृष्णपक्षे नवान्नं नाचरेद्बुधाः।
भवेज्जनान्तरे रोगी पितॄणां नोपतिष्ठते॥ *Bhojaraja.*

[1] Ed. Venimadhava De, Astavinsati Tattvam, 2nd Edition, Calcutta, 1314 B. S., pp. 324, 349-351 ; Do., Dc., Do., Udvaha-tattvam, p. 571-72.

रोगीति निन्दाश्रवणात् प्रसज्यता नोपतिष्ठत इति श्रवणात् पर्युदासतेति । *Raghun.*, Do.[1]

[1] Jogendra Smarta Siromani, M.A., B.L., Commentary on the Hindu Law, Calcutta, 1885, pp. 47-54 ; Do., Third Edition, Revised and Enlarged, Calcutta, 1909, pp. 109-152;
Veni Prasad v. Hardai Bibi, (1892) I. L. R., 14 All., 73, 106, 126 Same case in the P. C.; (1899) I. L. R., 21 All., 460=26 I. A. 146 ;
Dr. Jogendra Natha Bhattacharyya, M. A , D. L., Rules of interpretation in Hindu Law being Part II of Commentaries on Hindu Law, Second Impression, Calcutta, 1904, Ch. II, pp. 7-13 ; Ch. III, pp. 13-28 ;
Kishorilal Sarkar, The Rules of Interpretation in Hindu Law, with special reference to the Mimansa Aphorisms as applied to Hindu Law—Tagore Law Lectures, 1905, pp. 70-71 & p. 73 ; pp 235-239 ;
John D. Mayne, A Treatise on Hindu Law & Usage, Eighth Edition, Madras, 1914, pp. 36-38, para 34 ;
Jogendra Chunder Ghose, M. A., B. L., Rai Bahadur, The Principles of Hindu Law, Vol. I, Third Edition, Calcutta, 1917, Chapter XIV, pp. 1025-1034 ;
Ganganatha Jha, Hindu Law in its Sources, Vol. II, Allahabad, 1933, Preface as well as p. v ;
Golap Chandra Sarkar, Sastri, M. A., B. L., A Treatise on Hindu Law, Seventh Edition, Calcutta, 1933, pp. 18-19 ;
Avinasa Chandra Guha, M. A , B. L., Lecture Notes on Hindu Law, *sub voce* Mimansa Rules of Interpretation (Ms.).

Where a statute used language of a doubtful import and has been interpreted in a particular manner for a term of years, the interpretation given to that obscure meaning may reduce the uncertainty to a fixed rule.
—*A.I.R.* (6)' 53, *Travancore-Cochin* 212.

* * *

The progress of liberty is like the progress of the stream: it may be kept within its banks; it is sure to fertilise the country through which it runs; but no power can arrest it in its passage; and short-sighted as well as wicked must be the heart of the projector that would strive to divert its course.
Fox.

* * *

Whatever may have been the intention of the Legislature in passing a certain legislation, the Court is to be guided not by what the Legislature had in mind, but what they have expressed in cold print.
—*A.I.R.* (11) '52 *J. & K.* 45.*b*

* * *

It is the function of the Legislature to amend or modify the rule, when it is deemed necessary. In the guise of interpretation, Courts cannot usurp the function that is entirely within the jurisdiction of the Legislature.
—*A.I.R.* (1) '53, *Travancore-Cochin* 1 (*d*).

A BIRD'S EYE-VIEW OF THE PROPOSED CHANGES IN THE INDIAN COMPANY LAW

By

SRI PRANABESH MITRA

(*Second Year Student*)

The year 1953 *marks an epoch in the history of Indian Company Law. A stupendous piece of legislation consisting of* 379 *printed pages with as many as* 612 *Sections, besides other schedules etc., as against* 290 *Sections in the existing Indian Companies Act,* 1913, *was introduced in the House of the People on the 2nd September,* 1953.

In the following pages some of the changes under the proposed amended act have been dealt with.—[Editor]

On 2nd September, 1953 a bill, based broadly on the recommendations of the Bhaba Committee was introduced in the House of the People with the object of amending and consolidating Company Law. The resultant changes in the structure of the Act, according to our Finance Minister, Mr. Deshmukh "will eventually result in a better appreciation of the scheme of Indian Companies Act".

The broad features of the recent bill are the major and far-reaching changes envisaged in relation to the issue of prospectus, capital structure, meetings and procedure, presentation of accounts and their audit, the powers and duties of directors, inspection and investigation of the affairs of the companies, constitution of the Board of Directors and the powers of Managing Directors, the terms, condition of service and appointment of Managing Agents, their power of borrowing and taking loans and administration of the Company Law. Thus the bill aims at an all-round change in the various aspects of Company Law with a view to bringing about an effective improvement.

While analysing the main objectives of the bill, the check on the issue of the prospectus of the company is apparent at the very outset. The fullest possible disclosure should be made in the prospectus or statement in lieu of the prospectus issued both before and after a company is formed and any deviation from this practice will be dealt with severely. When public subscription is invited, an investor has to rely on the prospectus. So the prospectus should furnish all the particulars of the company and its true and complete previous history, if any. The same view was adhered to by the Stock Exchange, Bombay, in their Report of Company Law Committee, 1950-51 in which the stress has also been laid on adopting stringent measures to check the *malafide* activities of the Managing Agents. The present bill, thuogh not in favour of the abolition of the managing agency system altogether, has imposed a healthy check on it. It does not allow a company to pay any sum in excess of 12½% of its annual profits by way of remuneration to its Managing Agents.

Another predominant feature of the bill is the age-limit of 65 for a director and 20 as the maximum number of companies in which a person can serve as director. The latter has been a novel and at the same time an indispensable move since in a country like India one often comes across a director in a number of companies more than 20.

Other major changes sought to be brought out in the bill are the purchase of shares, the mode of redemption of redeemable preference shares and the shareholders' right to vote. In their Memorandum Report of the Company Law Committee, 1950-51, the Incorporated Law Society of Calcutta advocated the provisions for safe-guarding shareholders' interest

(*Continued on Page* 117)

ART. 286 OF THE CONSTITUTION OF INDIA— DISCUSSED IN PART

By

SRI SUSHIL KUMAR SAHA

(*First Year Student*)

The author delves deep into the intricacies of Art. 286 of our constitution and finds some ambiguities there. According to him there is a clear case for the amendment and clarification of the relevant portions of this Article of our constitution.—[Editor]

The relevant portion of the article 286 reads as follows:—

"286. (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) Outside the State:

Explanation—For the purposes of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-state trade or commerce":

Let us start with the elucidation of what is meant by 'inter-state trade'. Dealing with inter-state commerce, Willis remarks that "whenever there is traffic or commercial intercourse between a person in one state and a person in another State there is inter-state commerce". Douglas, J. further elaborates it by observing that "it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. .....It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice." If the inter-state movement has begun, it may be regarded as continuing, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement, till the property has come to rest within a State, being held there at the pleasure of the owner, for disposal or use, or for shipment elsewhere, as his interest dictates. Such a rest will make the property a part of the general mass of property within the State. **(In Minnesota Vs. Blasin).**

Thus for the purposes of inter-state commerce, the different States within the Indian Union may be treated as foreign to one another, and from the foregoing discussion it may be concluded that inter-state trade starts with the sale that occasions the export and ends with the receipt of delivery in the importing State.

Hence both the sale by the exporter and the purchase by the importer may be accepted as having taken place by way of inter-state trade, *i.e.*, in the course of inter-state trade; and under clasue (2) of Article 286, no state shall have the power

ordinarily to make laws imposing taxes on such sale by the exporter in one state and such purchase by the importer in another state, save and except with the previous sanction of the Indian Parliament by way of a legislation to that effect.

But the above conclusion can have no practial value in view of the construction given to Article 286 (1) (a) by our Supreme Court in the case: **The State of Bombay and another Vs. The United Motors (India) Ltd., and others,** where it is **desided** that the operation of clause (2) of Article 286 stands excluded as a result of the legal fiction embodied in the Explanation under sub-clause (a) of clause (1) of Article 286, and the State in which the goods are actually delivered for consumption can impose tax on inter-state sales or purchases as the Explanation invests an extra-state sale or purchase with an inter-state character. Yet I shall try to defend my proposition by attempting to give a different construction to sub-clause (a) of clause (1) of Article 286, though my discourse cannot have more than an academic interest as the decision of our Supreme Court is binding on all of us.

I am inclined to believe that the purpose of the sub-clause (a) of clause (1) of Article 286 is to impose restriction on the State's power to impose taxes on certain types of sales and purchases, and that is why the legal fiction is introduced in the shape of the Explanation which lays down conditions as to what will not constitute an extra-state sale; and that the meaning of inter-state sale that emerges as a result of that legal fiction shall be valid for the particular purpose that sub-clause (a) of clause (1) of article 286 has in view *i.e.*, for restricting imposition of taxes by State Legislatures on certain sales and purchases of inter-state character, even though such meaning comes into conflict with the meaning of 'sale' as per the general law as to sale of goods enacted in the Indian Sale of Goods Act of 1930. It is the age-old practice with the traders to consider delivery of goods to the carrier for the purpose of transmission to the buyer as unconditional appropriation of the goods to the contract of sale. Thus the delivery to the carrier at the local station has meant the constructive delivery to the buyer in another state. This is supported by sub-section (2) of section 23 of the Indian Sale of Goods Act, 1930. This is made a nullity by the said Explanation, so that such a sale cannot be taxed by the State of the selling-dealer by taking the same as a local sale. For no other purpose the legal fiction embodied in the said Explanation can be used. By virtue of the Explanation, the delivering State's Legislature cannot assume power to make laws taxing such sales or purchases which in reality are taking place in the course of inter-state trade and commerce. There is tremendous force in the following observation made by Justice S. R. Das in his dissenting judgement in the case of **The State of Travancore-Cochin and others Vs. The Shanmugha Vilas Cashew-nut Factory and others,** that a sale or purchase which falls within the Explanation does not become, in the eye of the law, a purely local sale for all purposes or for all times. It is to be deemed to take place in the state of delivery only for the purpose of clause (1) (a) *i.e.*, for taking away the taxing power of all other States. I can see no warrant for the argument that the Fiction embodied in the Explanation for this definitely expressed purpose can be legitimately used for the entirely foreign purpose of destroying the inter-state character of the transaction and converting it into an intra-state sale or purchase for all purposes. Such metamorphosis appears to me to be completely beyond the purpose and purview of clause (1) (a) and the Explanation thereto." He bases his conclusion on the following premises: he observes, "In all inter-state sale or purchase the property passes and the sale or purchase takes place in one or the other State according to the rules laid down in the sale of Goods Act and the inter-state character of the sale or purchase is not affected or altered by the fact of the property passing in one State rather than in another. What is an inter-state sale or purchase continues to be such, irrespective of the State where the property passes." We should note that the State Legislatures derive power to tax

generally intra-State sales and purchases not by virtue of the Explanation, but under Article 246 (3) read with entry 54 of list II of Schedule Seven under the Constitution.

Now given the above construction, Article 286 (1) (a) loses its independent merit as it indicates only one aspect of a inter-state trade which is made immune from the taxing power of the State where the goods were situated at the time of despatch while both the ends of an inter-state trade are made immune from States' taxation-capacity under Article 286 (2). This means that the effect of clause (1) (a) gets completely merged into the effects of clause 2 of Article 286 and this brings about the dissolution of clause (1) (a).

Thus there is a clear case for proper amendment and clarification of this part of the constitution if the Government of India are really anxious to restrain State Legislatures effectively from enacting laws imposing taxes on inter-state trade.

(*Continued from Page* 114)

by reducing the abuses in the exercise of voting control. Redemption of redeemable preference shares will be made strictly out of the profits of the company available for the dividend, or out of the proceeds of a fresh issue of shares made for the said purpose or out of the sale proceeds of the property of the Company.

According to the new provisions, the share capital of a company will be of two kinds only namely, equity share capital and preference share capital. The equity shareholder has a right, in proportion to the share of the paid up equity capital to vote on every resolution of the company while the preference shareholder shall not have any right to vote on any resolution placed before the company which does not directly affect the rights attached to his shares.

The most winning element of the reforms introduced in the bill is the inspection, investigation and report on the membership of the company and other matters regarding persons interested financially in the transaction of shares and debentures of the company. The Central Government has been given wide powers in this direction. Provision has also been made for setting up an appropriate authority for supervising the General Administration of the act and for exercising in the public interst the reserve of authority which must necessarily vest on some organs of the Government.

In conclusion, it may be said that the bill has been able to get rid of the pitfalls of the existing companies Act and it ensures the smoothness in company promotion and management. At the sametime, it has not been entangled itself into right rules hampering legitimate business or affecting enterprise adversely.

The changes sought in the Company Law as envisaged in the bill by exercising an effective check on the abuses undermining the strength of the economy of our country, through the regulation of the issue of prospectus, allotment of shares etc. on the one hand and investigation and inspection mostly carried on the lines of the English Companies Act will bring us nearer to the goal.

"It is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is".

Brogden Vs. Metropolitan Rly Co. 2 A.C. 692.

REVIEW OF THE LEGAL CONFERENCE

By

THE MAGAZINE SUB-COMMITTEE

An attempt has been made by the Magazine Sub-Committee of the University Law College Union to make a full review of the Annual Legal Conference of this year. We are indebted to Sri Tarun Chandra Dutta, one of the members of the Magazine Sub-Committee, for making the following review of the Legal Conference and acknowledge our deep gratitude for the same.—[Editor]

In pursuance of the traditions of our College, the Legal Conference was held on February 13, 1954 at the Asutosh Hall under the auspices of the Calcutta University Law College Union. The Hon'ble Mr. Justice Gopendra Nath Das kindly presided over the said Conference. Professor H. C. Dhar, Advocate, delivered the welcome address and Professor S. A. Masud introduced the Speakers of the evening to the students.

The first speaker of the Conference, Dr. S. C. Choudhuri, Barrister-at-Law and Principal, Surendra Nath Law College, began by pointing out the necessity of legal training for achieving success in many a sphere of life. The students of Law, according to him, have a wide field of choice before them.

He next defined law as simple **good sense.** If you know what is **good sense** you know what is law. To illustrate this truth he drew instances from the common incidents of life and showed that in all such cases the question whether any legal liability existed or not was one that was decided pre-eminently according to the dictates of commonsense. Thus while a cricketer whose **sixer** hurts a spectator has no legal liability whatsoever, the batsman who allows his bat to fly out of his hand and hit a spectator is legally liable for his negligence. For the **golden rule** is that the principle of legal liability has no application in cases where no negligence on anybody's part can be established. Furthermore Dr. Choudhuri cited extremely interesting cases to prove that the commonsense which is the guiding spirit of law is not the commonsense of an intellectual giant but the simple good sense of an average prudent man. For its abundant good humour and sparkling wit and freshness, Dr. Choudhuri's speech won the appreciation of all.

The next speaker, Mr. Ajit Dutta, an eminent Advocate of the Calcutta High Court, read out a thoughtful article analysing the dangerous character of the recently proposed amendments to the Criminal Procedure Code. He pointed out that attempts were being made by certain shortsighted people to destroy the basis of justice in criminal cases in our country in the name of expeditious and cheap trial. His article appears elsewhere in our magazine.

Professor Subimal Mookherjee, of the Department of Political Science of this University, next spoke on "Jurisprudence and International Law." Prof. Mookherjee contended in a neat little speech that the days of Austinian Jurisprudence are gone for ever and that today it is no longer true to say that **International Law is the vanishing point of Jurisprudence.** Under the impact of modern times, Jurisprudence, if it is not to become abstract and unrelated to the problems of life, must cease to be a purely formal science. What Jurisprudence

needs today, if it is to remain useful, is its union with sociology. If we can properly unite Sociology and Jurisprudence, the implications of the former will bring International Law right within the subject-matter of Jurisprudence.

Prof. Mookherjee asserted that to-day International Law is an undeniable reality, though it is often violated just as municipal laws are also violated; laws of war do exist though they appear to be contradictions in terms. Moreover International Law is gradually becoming a collection not only of inter-state laws but also of inter-unit laws affecting individuals living in different States.

Thus International Law should not be divorced from Jurisprudence; on the other hand, International Law, Jurisprudence and Sociology should be united together to serve the best interests of the whole mankind.

Mr. J. P. Mitter, Barister-at-Law, next dwelt on the efficacy of the jury system as an indispensable part of criminal trials in our country. He said that the jury system existed in almost all the civilised countries of the world and has been recognised by all concerned as a great safeguard against the arbitrary violation of the people's right to justice. Mr. Mitter held that as the Jury is required to give its verdict on the facts of a case and as these facts are the facts of common life, the jury consisting of several ordinary persons is likely to be more correct in its verdict than the single judge. Mr. Mitter deplored that a bill has been tabled before the Parliament for the abolition of trial by Jury and characterised the bill as a mischievous one and asserted that it was our duty to organise public opinion against such dangerous measures.

Hon'ble Mr. Justice Gopendra Nath Das, the President, who is also an ex-student and an ex-professor of our College, then addressed the conference. Justice Das gave us some very interesting instances of judicial visions going wrong. He pointed out that it was not humanly possible for all judicial pronouncements to be always consistent. But the duty of the conscientious lawyer, he held, was to present the case of his client to the best of his abilities and not to suppress any important facts or points in the case.

Justice Das asserted that it was wrong to say that Law as a profession had no prospects. For so long as the imperfections of human nature remained, disputes were bound to arise; and it was the function of law to resolve them peacefully and justly.

Next Justice Das said that some of the provisions of our constitution—specially its provisions regarding the fundamental rights—are bound to give rise to disputes. It would be the task of the Judges and the lawyers to settle such disputes. The adequacy and the validity of the amendments to our consitution are also to be decided by the Bench and the Bar. Moreover, under the constitution the High Courts are vested with vast powers of supervision over the lower courts. The exact scope of these powers is to be decided upon and the powers exercised in the best interests of justice.

These problems, the Hon'ble Judge held, will face us in the immediate future. They will have to be solved aright by our young lawyers. Thus the legal profession has still a lot of tasks to perform, and has its charms and attraction for those who are not afraid of work. The president exhorted the young students of law not to be apprehensive of the hard work that may lie ahead of them. For he said that what was needed was honesty to one's self and a love for law; these were the surest means of attaining success in a legal career.

When the Legislature uses expression having technical meaning attached to it, expression must be taken to have been used in that sense and in no other.

—*A.I.R.* (1) 53, *Orissa* 17 (*f*)

Union Notes

Compiled By
SRI HRISHIKESH SARKAR, GENERAL SECRETARY,
Calcutta University Law College Union, Calcutta

I

RE-UNION ADDRESS BY THE GENERAL SECRETARY ON 29TH AUGUST, 1953

Mr. President, Honoured Guests, Ladies, Gentlemen and Fellow Students :

I deem it a proud privilege to address you on this happy occasion. We just meet after the lapse of a year and I am full of ecstacy to exchange our good whishes, and to have happy recollections. The sentiments of the past lead us to the path of sucess in future. We must not fail to recognise ourselves in future in our weal and woe. This re-union, I am sure, is to develop thoughts and ideas which will be beneficial to the countrymen in general and the students in particular. Our country is now confronted with serious problems. We are students of Law and so it would not be imprudent and unwise, if I say that our best efforts should be directed towards the construction and betterment of our country.

I am sure, the fortunate few of the ex-students who have reached the highest pitch of glory in this country have left their footprints for us to follow. Dr. Rajendra Prasad, the first President of the Indian Union, is one of them. The several leaders, lawyers and jurists cannot be forgotten in this connection. The first Premier of the Indian Union is also a lawyer and we are therefore inclined to think that legal training and legal knowledge are great assets to acquire eminence in public and individual life. We must therefore understand the real spirit of law for building the Nation and not for achieving our individual ends.

Now I am to give you a short history of our Union. We assumed charge of our office just towards the close of the last session. Last year we had our Constitution amended and it is now being followed. The functions which we have to hold are numerous but the funds at our disposal are meagre. The scope of the Union should not be limited to its own college but there should be scope of extending our activities throughout India and even outside. This year we have a new idea, and we desire sincerely to actualize it. We have created a new office termed as 'Inter-Varsity Relation'. This will, if we are able to spare funds proportionately, certainly help us to proceed in the way. In this connection I am glad to say that on the 13th August last we arranged a reception to a group of students from California. This was a very pleasant occasion and we assembled in groups and had a sincere and warm discussion on many controversial subjects for about three hours. This exchange of thoughts among students sharpens our

intellect and clarifies confusions. I do not say that we are anxious to imitate others, on the contrary we must be competent to have ourselves imitated by others. If funds are available, our fellow students who are in no way less in qualifications than others in other hemispheres will certainly be able to work miracles in the advancement of law.

On this occasion I must not fail to express our deep sorrow at the sad demise of the great son of India Dr. S. P. Mookerjee who was a student of our college, then a Professor and then President of the Governing Body of this College. So far as we have collected, his contributions towards the development of this college just following the footprints of his great father, were innumerable. We all feel aggrieved to lose such a great son of Mother India who had outstanding personality, erudition and power of oration. We convey our condolences to his bereaved family. We also mourn the loss of Mr. K. K. Basu, an ex-Professor of this College and a distinguished member of the Calcutta Bar. His sudden and premature death has overwhelmed us.

We have to perform several duties in our term and they will be completed preferably by the end of December next.

In this Re-Union, we have eminent persons amongst us who will give us light and assurance for our esteemed future. We shall be grateful to them if new ideas and plans are placed before us. Although this ceremony is held only once a year, its significance can in no way be ignored. That is why we desire to be stronger with ideas and ideals. The speakers who have so kindly assembled here will, I hope, kindle the light to remove darkness from our mind.

I am proud enough to say that this Re-Union has been glorified with the presence of the Hon'ble Justice Sri P. B. Mukharji as the Chief Guest, and of Sri Sailakumar Mukherjee, Speaker, West Bengal Legislative Assembly, as the President. We are deeply grateful to each of them. Our sincere thanks go to them. They are all outstanding personalities in this State.

We cannot but recall the service of Professor R. M. Majumdar, under whose guidance, as President of the Union, we have been greatly benefitted. The present President of the Union, Professor S. A. Masud has been connected with this Union for the last six years. He is not only a friend of the students but his services are invaluable. His efforts and directions to make the functions of this Union successful deserve special reference. We are proud to have him at the helm of affairs. Our Vice-President and Editor-in-Chief of the College Magazine Sri P. C. Chunder has been of great assistance to us. We have this time two other Vice-Presidents *viz.*, Dr. B. N. Mukherjee and Sri S. K. Mitter who are equally helpful and about whom we cherish high hopes.

I am proud and grateful to the members of the Working Committee, the members of the Central Council of our Union and in particular to Mr. Mrityunjoy Basu and Bijan Babu for their heartiest co-operation in every respect and particularly to make this function a grand success. I crave sincerely and eagerly their full co-operation at every stage of our Union activity in future. We cannot forget our Principal Dr. P. N. Banerjee and our Vice-Principal Mr. A. C. Karkoon who, inspite of our many commissions and omissions, had always listened to our grievances sympathetically.

It is true that all the functions might be forgotten in course of years. The only source of recollections is the College Magazine which is issued only once a year. This is due to paucity of funds. This Magazine should, we hope, be published at least twice in a session and it should be furnished with articles from eminent lawyers, jurists and fellow-students of the College. However, the College authorities have from the last session introduced the

Magazine fee on the recommendation of the then Central Council of the College Union. But still it is very difficult to achieve the cherished goal and fulfil the desire. This can only be possible if sufficient funds are left at the disposal of the Union.

I beg to be pardoned if I request the ex-students of this College to co-operate with us in all the functions of this Union and help us in promoting the cause of this Union in every possible way. This can easily be done, I hope, if we have a chance to form a Committee titled as the 'Advisory Committee' which will be consulted at times to discuss the progress of the Union and to suggest ways and means for development of new ideas and for making their old college glorious in this Indian Union. We sincerely appreciate the voluntary and generous contributions which we have received from certain ex-students and we are indeed grateful to them.

In conclusion I thank you all Mr. President, the honoured guests, ladies and gentlemen and fellow students from the very core of my heart for your kind presence on this occasion to inspire us and infuse us with new hopes and ideas.

We have arranged for a variety entertainment which we sincerely hope, will give you some enjoyment.

Sk. Sajjad Ali

II

Ourselves

For the College Union the year which we have just left behind can be described as a very uneven one. The movement of events had so many ups and downs that the entire student community swung in the waves of uncertainty. Immediately after the re-opening of the College after the Summer vacation (during which Dr. Shyamaprasad Mookerjee, one of our national leaders and a distinguished educationist and ex-student of our College, died) Calcutta witnessed the great disturbance. July disturbance, as it is commonly called, led to the suspension of the activities of not only our Union but of many other institutions of the metropolis. As a result, we had to hold our usual Re-Union function, which is the first and foremost function of the Union, at the end of August. Since August, of course, the activities of the Union proceeded without interruption till the Puja vacation. During this period we held, besides the Re-Union function, a function to welcome the delegates from the University of California, published several issues of the College Forum and staged a drama; we also arranged several class-debates. Again for the first time this year those students of our college who attended the Convocation of the University were given a hearty reception at the University lawn. But at the end of the session the activities of the Union were again interrupted by the Teachers' Strike. It is in this perspective that our readers should view the functioning of the Union. But even though there were obstacles beyond our control, the functions of the Union were performed so smoothly and with so much success that the students hardly felt the difficulties in our way. For this, of course, the credit goes to the departmental Secretaries and Working

Committee members and to the general body of students.

During the period under review, Professor Ramendra Mohan Majumdar retired from the Presidentship of our Union for his ill health. He was the President of the Union for six years from 1937 to 1942 and again for the last four years from 1949 to 1952. He was keenly interested in the Union affairs. We convey our heartfelt gratitude and thanks to him.

This year, Professor B. K. Basu also retired from the Vice-Presidentship for identical reasons. We also convey our thanks to him.

Professor S. A. Masud has been elected President of our Union. For a long time he has been associated with the Union as Vice-President and he has always taken active part in its activities and has inspired us in every way. We take this opportunity to convey to him our sincere congratulations.

Professor S. K. Mitter and Dr. B. N. Mukherjee were made Vice-Presidents of our Union. Professor Mitter has kindly consented to take the charge of the treasury. We also convey to them our sincere congratulations.

From the month of June several Central Council members ceased to be members of the Union. In order to give a chance to the first year students to send their representatives to the Union, some members were co-opted to the Central Council. They subsequently took active parts in the Union affairs.

After the month of November our elected General Secretary, Sk. Sajjad Ali, had to retire as he had completed his LL.B. course. The responsibilities of the General Secretary then fell on Sri Hrishikesh Sarkar. He tried his best to carry on this function with the help and co-operations of the Joint Secretaries and the students in general.

Before we give our sectional reports we must mention the untiring efforts and unstinted co-operation of Professors S. A. Masud, B. N. Mukherjee, S. K. Mitter and P. C. Chunder to make each function of the Union a great success. We are also grateful to our Principal and Vice-Principal for their kind advice to us in all matters. We are also thankful to the staff of the College office, specially to Sri Mrityunjoy Basu, Sri Bijan Chakraborty and Sri Sribhusan Mitra for their ready help and co-operation on all occasions.

We also present in each Departmental Report the Sub-Committee of that Department. President and General Secretary of the Union are **ex-officio** members of each Sub-Committee.

ANNUAL RE-UNION

Our Annual Re-Union function was held in the University Institute Hall on the 29th August, 1953. Hon'ble Mr. Justice P. B. Mukherji graced the function as the Guest-in-Chief and Hon'ble Mr. Saila Kumar Mukherjee, Speaker, West Bengal Legislative Assembly, Presided over the function.

We have received much help and advice from different Bar Associations of the city and Howrah.

Among the artist participated in the function, we may mention the names of Suchitra Mitra, Sabitri Ghose, Sumitra Das Gupta (Sen), Shymal Mitra, Dwijen Mukherjee, Santosh Poddar, Late Sandwip Sanyal etc.

The function was a neat one.

SUB-COMMITTEE

Jt. Secretaries:—
Sri Ranjit Kr. Sanyal (Retired)
Sri Subodh Das Gupta

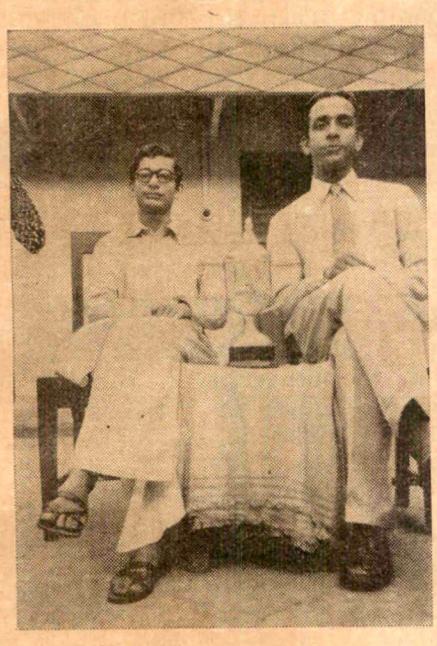
Members:—
Sri Siddheswar Prasad
Mrs. Archana Sen Gupta
Sri Subodh Ghose
Miss Bithi Roy

DEBATES

"A great negotiator is nothing, when compared to a great debator, and a minister who can make a successful speech need trouble himself little about an unsuccessful expedition"—so says Macaulay, whose erudition in Law needs no introduction. Debating talent, indeed, is the most valuable acquirement in the career of a lawyer.

For in the administration of justice, "truth is best elicited and difficulties are most effectively distinguished by opposite statements of able men" (Basil Montagu). Bearing all these in mind, our students' Union has never failed to stand our budding debators in good stead. In our approach, we have been schemers rather than dreamers. Our college can well boast of possessing a galaxy of debators to each of whom we extend our sincerest thanks.

Our Debate Champions
(In Inter-Varsity Debate, Laknow University)



(L. to R.). Sri Jahar Sen & Sri Sankar Dutta.
Photo : Sri Amar Saha.
(Second Year Student)

Special mention should be made of Mr. Sudhangsu Das Gupta, Mr. Shyamsundar Mahapatra, Mr. Mihir Mukherjee, Mr. Mrinal Sen, Mr. R. K. Anand, Mr. Sankar Dutt and Mr. Puspamaya Das Gupta; whenever we called upon all of them, they have spared no pains to uphold the dignity and tradition of their beloved college.

In the All-Bengal Inter-Collegiate Debates organised on different occasions by the Post-Graduate Commerce Students' Association (evening), University Institute, Calcutta Rotary Club, Calcutta Medical College, Berhampore Krisnath College etc., our College was represented by exceptionally skillful debators like Mrinal Sen, Pushpamaya Das Gupta, Debkumar Mukherjee, S. M. Murshed, R. K. Anand, Jiten Das, Jahar Sen, Arun Mukherjee and Mihir Mukherjee. In an Inter-Collegiate Debate organised by the University Institute, Sri Jahar Sen won the individual first prize. In the Inter-Hostel Debate, organised by the Poddar Chhatra Niwas, the University Law College Hostel won the team-championship and Sri Arun Mukherjee was awarded the third prize. We are very glad to record that our college annexed the Jay Dutt Tewari trophy in the All-India Inter-University Debate Competition held under the auspices of the Law Society, Lucknow University, on 20th January, 1954. Our team was represented by Mr. Jahar Sen and Mr. Sankar Dutta, who stood second and third respectively.

In a debate competition held under the auspices of our Union, Mr. R. K. Anand and Mr. S. M. Murshed, both stood first and Mr. Pushpamaya Das Gupta stood second.

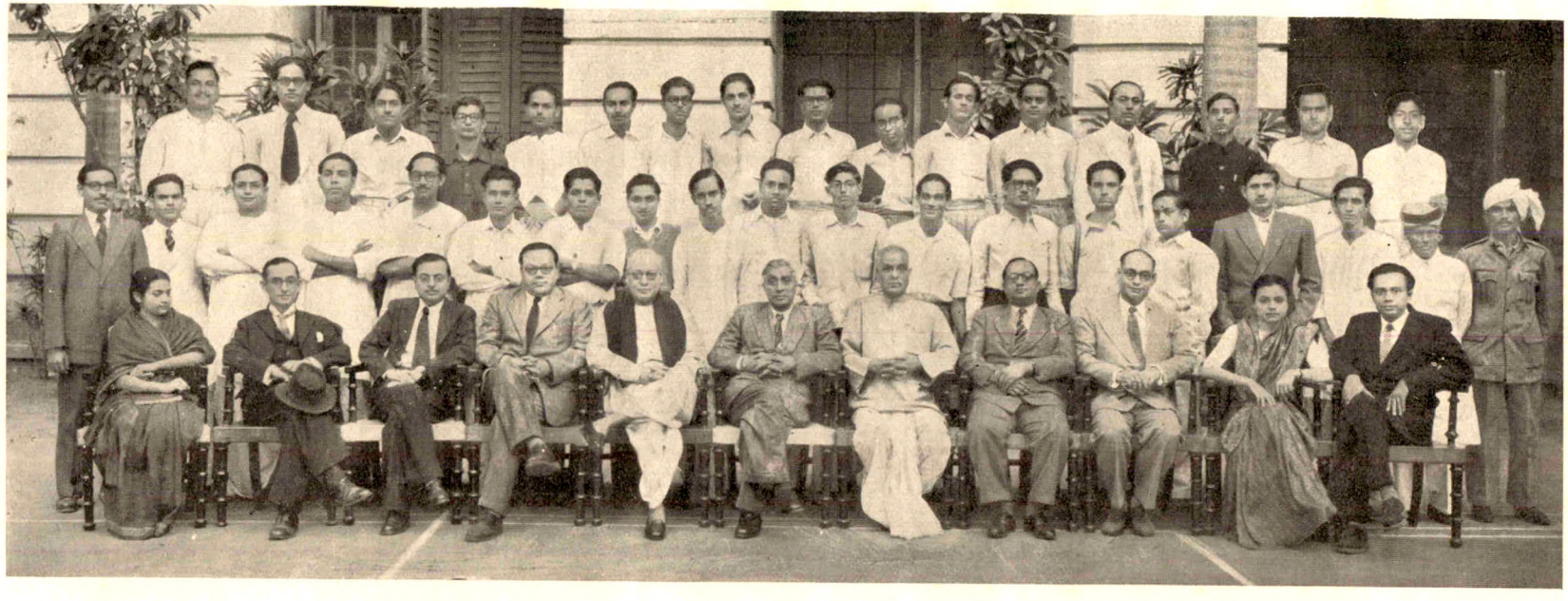
SUB-COMMITTEE

Jt. Secretaries:—
Sri Jahar Sen
„ Dharambir Lal

Members:—
Sri Anil Mukherjee
„ Biren Paruckh
„ S. S. Rao.

CALCUTTA UNIVERSITY LAW COLLEGE UNION

CENTRAL COUNCIL 1952-54

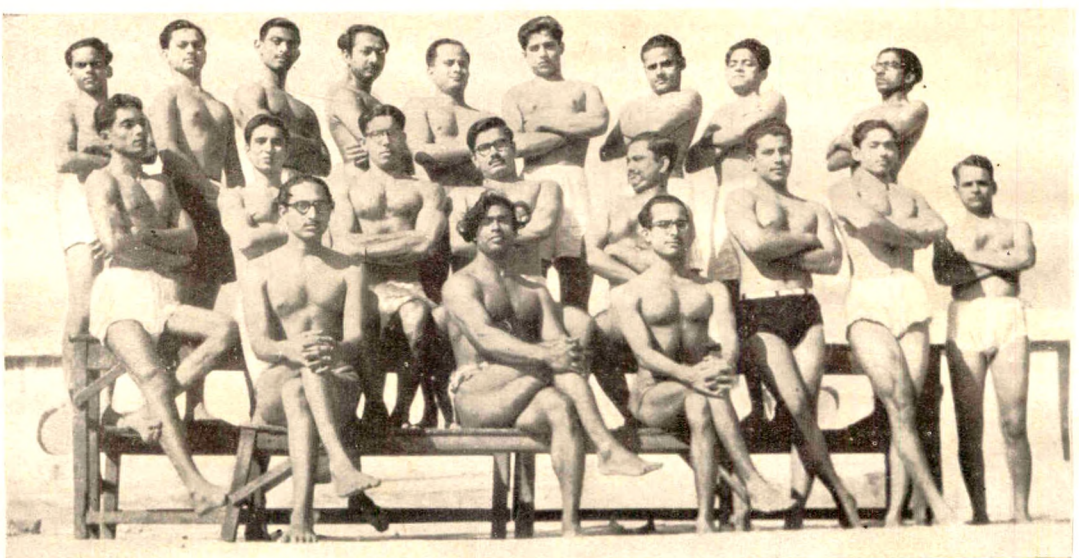


Sitting (L. to R.) —Miss Bithi Roy, Prof. B. N. Mookerjee (Vice-President), Prof. P. C. Chunder (Vice-President), Prof. S. A. Masud (President) Dr. P. N. Banerjee (Principal), Sri S. N. Banerjee (Vice-Chancellor), Sri A. C. Karkoon (Vice-Principal), Prof. S. K. Mitter (Vice-President), Sri M. N. Ghosal (Jt. Secy. Social Services), Mrs Archana Sengupta, Sk. Sajjad Ali (Retd. Genl. Secy.).

Standing 1st. Row (L. to R.)—H. Sarkar (Genl. Secy.), B. Jana, S. C. Sur, S. Dasgupta (Jt Secy. Re-union), D. Mitra, A. K. Chatterjee (Jt. Secy. Magazine & Forum), D. Mookerjee (Jt. Secy. Students' Aid Fund), D. Lal (Jt Secy. Debate). A Banerjee, A. Kaunda (Jt. Secy. Cultural & Legal Conference), S. Dutta, Md. A. F G. Osmani, Md. Taha Ashique (Jt. Secy. External affairs), N. C. Das Sarma, A. Khan, Md. Taher Ali, S. K. Basu (Asst. Genl. Secy.), G. Ram (Bearer), R P. Singh (Bearer).

Standing 2nd Row (L. to R.)—P. Ghose, P. Dutta, S. Sen, J. Sen (Jt. Secy. Debate). A. N. Chatterjee, P. K. Banerjee, P. C. Dutta, B. N. Choudhury, A. Mookerjee, D. Mookerjee. J, Guha. R. M. Ghose, A. C. Sen, (Jt. Secy. Social & Drama), Abdul Sovan (Dufftary), B. Sen (Retd. Jt. Secy. Magazine & Forum), R. Sanyal (Retd. Jt. Secy. Re-union).

OUR GYMNASIUM



Sitting L to R. —Dilip Krishna Mitra (Jt. Secy.), Monotosh Ray (Instructor), Gobinda Lal Mukhuty (Jt Secy.).

Standing (1st Row) L. to R.—Jiten Das, Amitava Dutt, Chitta Ranjan Ray Chowdhury, Anshuman Ganguly, Pratyush Ghosh, Vivekananda Mondol, Gour Mohon Kundu, Parashu Ram (Bearer).

Standing (2nd Row) L. to R.—Bishnu Jana, Rathin Mitra, Chitta Ranjan Das Gupta, Ajit Ghosh, Kalipada Hazra, Asoke Chakravarti, Nirmal Sanyal, Harinarayan Mukherjee.

Prof. Subimal Mukherjee, Lecturer of the Departments of Political Science and General History presided over the function. An extempore speech competition formed an attractive feature of our activities. Mr. Mrinal Sen stood first, speaking on "Responsibilities of a student as a citizen", Mr. R. K. Anand second, speaking on "A striking incident of my college life", Mr. Sankar Dutt third, speaking on "Women should go back to the kitchen," and Mr. I. C. Khemain fourth speaking on "The future society I dream of." Our Vice-Principal, Prof. A. C. Karkoon presided over the function.

We also proposed to organise an All-India Inter-University Debate competition. But unfortunately the plan could not be materialised due to the disturbances of Teachers' Movement in Calcutta.

With a note of encouragement to the next Union and assuring them of our humble co-operation, we beg to retire.

ANNUAL LEGAL CONFERENCE

The Annual Legal Conference was held in the Asutosh Hall on the 13th February, 1954 with the Hon'ble Mr. Justice Gopendra Nath Das of the Calcutta High Court in the Chair. Eminent jurists and educationists participated in the function. The speakers of the day were the Hon'ble Mr. Justice Das, Dr. S. C. Chowdhury, Barrister-at-Law and Principal, Surendranath Law College, Sri Ajit Kumar Dutta, Advocate, Professor Subimal Mukherjee, Lecturer, Political Science, Post-Graduate Department, Calcutta University, Sri J. P. Mitter, Barrister-at-Law. The Magazine Sub-Committee has endeavoured to make a review of the Conference for which we are really thankful.

SUB-COMMITTEE

Jt. Secretaries:—
Sri Anil Kundu

Members:—
Sri Dwijen Lahiri
„ Mriganka Shekhar Pahari
„ Susil Kumar Bhowmick
„ Samir Sen Gupta.

Social & Drama

This year on the occasion of our break-up before the Pujas, we staged Tarasankar's 'Kalindi' at Rangmahal on the 5th October, 1953. The Drama was a unique success. Sri Sachin Sengupta graced the occasion as the guest-in-chief. He spoke very highly of the students of this great institution for their disciplined and restrained behaviour. The drama was staged in the presence of a distinguished audience and the Hall was packed to capacity. Before the drama a neat musical programme was gone through under the direction of Dr. B. N. Mookherjee, our Vice-President. The performance was wonderful and amply demonstrated what we can expect from our college students.

SUB-COMMITTEE

Jt. Secretaries:—
Sri Anil Sen
„ Ashit Roy Chowdhury
„ Ramen Mukherjee

Members:—
Miss Chitra Sen
Mrs. Pratibha Banerjee.

On the 27th March, 1954, we are going to celebrate our Annual Social on which occasion also only the college students, under the direction of Professor B. N. Mookherjee, will give the performances.

STUDENTS' AID FUND

Last year a new section had been opened under this department to lend books to the deserving students. This is a unique system in an institution like ours

SUB-COMMITTEE

Secretary:—
Sri Dulal Mukherjee

Members:—
Sri Dhiren Mitra
„ Nihar Ranjan Roy
„ Amiya Khan
„ Sreelekha Devi.

where books are not easily available. It is the function of this department to give economic relief to the needy and meritorious students of our college. Like last year, this year also we shall distribute among the students books and money for college-fees and examination fees which, we believe, will be of great help to the recipients. This year the college authorities have for the first time contributed to our Fund an equal amount with the students. We thank the authorities for this generous gesture and hope that in future their contribution will increase.

MAGAZINE AND FORUM

Although we are crying to bring out our magazine twice a year, the cry even today seems to be of no avail. The magazine, which is an indispensable appendage to every academic institution through which the students can express their ideas, has till today been utterly neglected. We sincerely hope that the college authorities will take the matter seriously. Also we should request the authorities to contribute to the publication of the college magazine an amount equal to that contributed by the students. At present the entire burden is borne by the students and it seems the authorities share no responsibility in this respect, pecuniary or otherwise.

The venue for the expression of the views and opinions of the students should be a wide one. With this end in view the college Forum Board has been opened and has been regularly published. Although the students have showed keen interest in it we feel that even greater response should come from the students.

Again it must be mentioned that it is a strenous job for one Secretary to take full charge of the two publications. So it is high time that, as under the old constitution, these departments are separated and the charge divided accordingly for easy and expeditious functioning.

INTER-VARSITY RELATIONSHIP

Although there was no provision for it in the new constitution of our Union, a new office for Inter-varsity Relationship was opened by the Central Council of the Union this year. This office has proved to be of immense help and we sincerely believe that it will be of greater use and benefit in future. We can not however make out why provision for such an office has not been made in our constitution. It is high time that our successors will correct the omission.

This year we have been able to establish cultural and friendly relationship not only with the law colleges of India but also with different Universities of India and the world.

On the 13th August last we welcomed a batch of students from the University of California. The students of Law College assembled in the Pischell Hall in the morning when the Jt. Secretary, Inter-Varsity Relationship, introduced the American Students. Professor S. A. Masud, President of the Union, welcomed them, while Sk. Sajjad Ali, General Secretary, addressed the gathering. Sri Ajit

SUB-COMMITTEE

Editor-in-Chief:—
Prof. P. C. Chunder (*Ex-officio*)

Editor:—
Sri Ajit Kr. Chatterjee (*Ex-officio*)

Jt. Secretaries:—
Sri Bidyut Kumar Sen (Retired)
„ Ajit Kumar Chatterjee

Members:—
Sri Tarun Chandra Dutta
Miss Manjushree Dutt
Sri Tarun Tapan Sen.

SUB-COMMITTEE

Secretary:—
Md. Taher Astique

Members:—
Sri Anjan Banerjee
„ Hari Sankar Lall
„ Niresh Bagchi
Miss Saroj Nalini Devi.

Chatterjee, Editor of our College Magazine presented a copy of the College Magazine to the team on behalf of the Union. The students of this college got an opportunity to discuss freely and frankly some of the complicated problems of the day. It was really a neat function.

We also arranged some lectures on different topics delivered by some of the constitutionalists of different countries of the world.

When Dr. Jagan and Mr. Burnham of the British Guiana were given a hearty reception jointly by all the Students' Unions of the metropolis, it happened that both the proposer and the seconder of the resolution, moved by the students as a protest against the attitude of the British Government in suspending the constitution of British Guiana, were our working committee members. It shows that we have come to the forefront to stop lawlessness even abroad. We also contributed some money to the fund for British Guiana.

Lastly, by exchanging letters and journals we came in closer contact with the different students' organisations of India and abroad.

SOCIAL SERVICES

Even though there is no provision for a Social Services' Department in our constitution, the Central Council of our Union, at the very outset, realised the value of such an indispensable department and duly opened it. We ardently hope this department will continue its functions in the future.

SUB-COMMITTEE

Secretary :—
Sri Mahendra Nath Ghosal.

We have been able to sell T. B. Seals issued by the Tuberculosis Association. The movement has been a success.

We have also tried to contact different medical institutions in the city and suburbs. We believe there is much to be done in this line.

III

Some reports of the Session 1951-52

1 & 2 *Debate and Magazine* :—

At the time of publication of our College Magazine last year, we organised our inter collegiate Debate which was held on 19th March, 1953, in which Presidency College won the individual first prize, while post-graduate department of the Calcutta University won the team championship.

Sri S. N. Dasgupta
Jt. Secretary, Debate
1951-52

Of the articles contributed by the fellow students in our last year's magazine, Sri Subhas Chandra Basu, who wrote on 'Liberty versus Authority', received the first prize and Sri Sephali Sinha, who wrote on 'Professor Bordom on Trial,' got the second prize.

Sri M. L. Jhunjhunwala
Jt. Secretary, Magazine
1951-52

3. *Students' Aid Fund* :—

As the Students' Aid Fund is disbursed at the close of each session, the report of its actual working can only be published in the magazine after one year. Hence now we fall back upon the last year's file.

The session 1951-52 marks the second year of the distribution of such fund among the needy students. In that session several new methods have been introduced for such distribution.

First, after properly interviewing each applicant the Students' Aid Fund Sub-Committee and Vice-Principal made the final decision for distribution.

The payment of lump sum money had been abolished; instead, the arrears of college fees or examination fees of the recipients were paid. Rs. 900/- had been distributed in this manner.

Next, a unique system of lending books from the Students' Aid Fund had also been introduced. For this purpose books of the value of Rs. 400/- had been purchased, and distributed among the needy students. These books are refundable and shall be distributed to needy students from time to time.

In this connection it must be mentioned that we owe much to our Vice-Principal who inspired us to open such a section which will really be of great help to the students. However, it must be mentioned that the college authorities must help the fund and must actively supervise this section of the fund. For, unless there is a permanent body to look after it, we are afraid, such a section cannot function well. It may also be suggested that either the Principal or the Vice-Principal should be made an ex-officio member of the Students' Aid Fund Sub-Committee. This will require an amendment to the constitution of our Union. So we leave it to our successors.

AJIT KUMAR CHATTERJEE,
Secretary, Students' Aid Fund
1951-52.

IV

Lending of Books from the Students' Aid Fund

A Committee was formed to draft rules for lending books from Students' Aid Fund. On behalf of that Committee Sri Ajit Kumar Chatterjee, Ex-Secretary, Students' Aid Fund, presented the draft rules before the Working Committee on the 20th August, 1953. The rules were accepted unanimously. We are glad to publish the rules for information of our general students.

Rules for lending of books from the Students' Aid Fund:

1. Under the auspices of the Students' Aid Fund Sub-Committee, some law books will be lent to the members of the Union from time to time.

2. The Jt. Secretary for Students' Aid Fund, will remain in charge of the books and will be held responsible for the same to the Working Committee.

3. A "Register of Books" for the lending section shall be maintained by the Secretary of the Sub-Committee which shall contain the particulars of the books with special reference to the source from which they were received.

4. The Secretary, by the middle of August of every session, will issue a notice requesting the members of the Union to contribute books for the Students' Aid Fund.

5. The books supplied to the students shall be returned to the Sub-Committee for re-issue to other deserving students after the date of return.

6. A "Register" containing the list of books, delivered to the students with their signature and date of issue and date of return shall be maintained by the Secretary. He shall serve notice to the members who will fail to return the books within due dates and shall bring the matter to the notice of the Principal or Vice-Principal, after seven days of such notice.

7. The Committee shall determine the period for which the book or books shall remain in charge of the students.

8. Any dispute, controversy or matter not referred to in the aforesaid rules, would be referred to the President or in his absence to any of the Vice-Presidents whose decision shall be final.

9. The Working Committee shall have the power to amend the rules and to make new bye-laws.

10. The Secretary, at the end of the session, shall hand over the charge and accounts of the Committee to the General Secretary, who in his turn will deliver the same to the incoming General Secretary of the next session and the latter will hand it over to the new Jt. Secretary for the Students' Aid Fund within a week of his being elected.

11. The rules mentioned above shall be valid retrospectively with effect from 31st March, 1953.

ANNUAL REPORT OF THE ATHLETIC CLUB 1953-54

It is with great pleasure that we present to our readers this annual report of the University Law College Athletic Club. In the year under review, we have been able to achieve distinctions in all important sections of University sports and athletics, and we feel very proud to report its continued development and progress.

The football team under the captaincy of Sri Mihir Roy gave a glorious account of itself. Though we could not do well in the Inter-Collegiate League and Knock-out Turnaments due to leave difficulties of some of our star players, we have the unique record of winning the Prasanna Dev Smriti Phalak Tournament, organised by Jalpaiguri Town Club for the first time. On becoming winners of this coveted trophy, we made a trip to an important Tea Estate in the dooars, where we were the guests of Sri S. P. Roy, M.P., the President of Jalpaiguri Town Club. We take this opportunity of recording our deep appreciation of the generous hospitality shown us there.

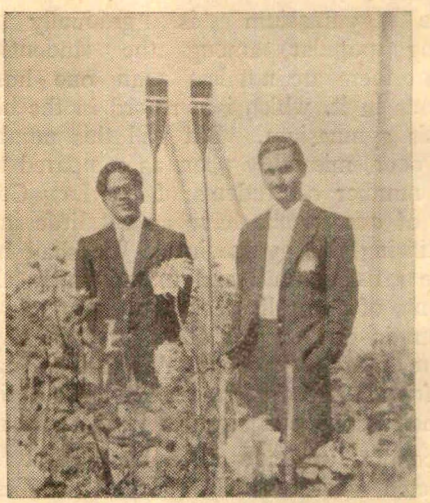
The secret of our footballers' success lay in their wonderful team-work and cheerful optimism under all conditions. Sri Runu Guha Thakurta, a member of the Indian Football team to the XV Olympiad held at Helisinki, was the most able and all-round performer, while the skipper himself along with Messrs. M. Majumder, Arun Mitter and many others did notable service. Sri Arun Mitter was selected skipper of the Calcutta University Football Team in the Inter-Varsity Football championship and under his able captaincy the Calcutta University won the Inter-Varsity championship. We are proud to associate him with us, and our sincerest congratulations go to him on his achievement of this unique honour.

The Rowing Club under the captaincy of Bhawani Roy also played their part in the all-round development of the Law College Athletic Club. Sri Mohan Baksi became the runner-up in the Senior Sculling and won the Junior Sculling in the Inter-College regetta.

The College also participated in the Inter-Collegiate Indoor Games Tournaments. In the billiards Sri Joginder Singh of our college gave a wonderful display to reach the final by defeating last two years' champion.

The Cricket team, under the leadership of Sri Kallol Bose, acquited themselves creditably in the University Tournaments. Sri Kartick Chakravorty and Sri Ranjan Dutt were selected for the Calcutta

Our Regetta Champion.



(L. to R.). Sri B. P. Roy (Capt., Rowing Club)
Sri M. Baksi (Champion)
Photo : Pratyush Ghose (First Year Student)

University team in the Rohinton Baria Tournament. Sri Pradeep K. Chatterjee, Arun Roy, Aseem Sur and Amitava sen did very well in all the matches we have played so far.

Sri K. G. Antony, the skipper of our Vollyeball team has been selected to re-

(*Continued on Page* 131)

ANNUAL REPORT
OF THE
CALCUTTA UNIVERSITY LAW COLLEGE GYMNASIUM
1952-54

It is a matter of great satisfaction that our University Law College has a magnificient gymnasium well furnished with appreciably up-to-date scientific instruments. The Physical Instructor in charge of it is no less a person than Mr. Manotosh Ray (Mr. Universe). We are extremely proud to have this modern Samson—this Colossus of Muscledom—as our inspiration and guide.

The gymnasium is gradually becoming popular among the students. At present there are not less than one hundred students in it, which is a record in the history of this gymnasium. But still this number is very poor, miserably poor, as compared to the total number of students of the Law College. Most of our friends have as yet little interest in utilising this gymnasium. We shall not at all be satisfied until and unless nearly all the students of our college start utilising this gymnasium in one way or other for their physical culture and development. We humbly call all our friends to co-operate with and inspire us by their active participation in this gymasium.

Secondly, we have a humble request to our respected Professors also. It is needless to remind our venerable teachers that the gymnasium is open to both the Professors and the students; but we find not a single Professor taking part in our gymnasium. We earnestly request our Professors to take part in our gymnasium with their beloved pupils and to set an example in this regard.

Next, we bring to the notice of our college authorities the great necessity of making arrangement for the physical culture of girl students. In spite of the fact that the number of girl students in our college is increasing every session, we have still no gymnasium for them. We do hope that importance of physical culture for the girl students would be properly realised and that the college authorities will consider this point without delay.

Lastly, we express our heartiest thanks and sincere gratitude to our college authorities for their ready help and co-operation given to us. It is due to their ready response to our request for Rs. 650/- that we are able to run our gymnasium smoothly and successfully. We hope that in future also we shall not be deprived of their fostering care.

We have many items of news for our fellow students:

On 23rd March, 1953, the annual Competition for the year 1953-54 was held. There were four different items—

(1) Mr. Law College (the best physique), (2) Mr. Samson (the most powerful man), (3) Yogic Ashan, (4) Endurance (includes 'Baithaks' and 'Dawns').

The results of the Competitions were as follows:—

Mr. Law College

First Prize	—	Sri Gaur Kundu
Second Prize	—	,, Bibhuti Bhusan Roy
Third Prize	—	,, Dilip Krishna Mittra
Special Prize	—	,, Pratyush Ghosh

Mr. Samson

First Prize	—	,, Sachin Basak
Second Prize	—	,, Dilip Krishna Mittra
Third Prize	—	,, Gaur Mohan Kundu

Yogic Asdan

First Prize	—	,, Pritish Ganguly
Second Prize	—	,, Rathin Mitra
Third Prize	—	,, Gobinda Lal Mukhuty

PRESIDENTS, EDITORS AND GENERAL SECRETARIES

OF THE

CALCUTTA UNIVERSITY LAW COLLEGE UNION, 1928-54

PRESIDENTS

1928-1930—Professor Ramaprasad Mookerjee
1930-1931—Professor Pramathanath Banerjee.
1931-1933—Professor Debendranath Mitra.
1933-1935—Professor Ajoy C. Dutt.
1935-1937—Professor Ramaprasad Mookerjee.
1937-1942—Prof. Ramendramohan Majumdar.
1942-1943—Professor Sudhis Chandra Ray.
1943-1946—Professor S. N. Bhattacharyya.
1946-1949—Professor B. Raychaudhuri.
1949-1952—Professor R. M. Majumdar.
1952-1954—Professor S. A. Masud.

EDITORS

1930-1931—Sri Dhiraj Ghose.
1931-1932— ,, Ranjitkumar Banerjee.
1932-1933— ,, Jotin Mookerjee.
1933-1934— ,, Pareshnath Banerjee.
1934-1935— ,, Dhrubajyoti Sengupta.
1935-1936— ,, Kalipada Biswas.
1936-1937— ,, Sachindrakumar Roy.
1937-1938— ,, Jitendranath Mukherjee.
1938-1939— ,, Susilkumar Ray.
1939-1940— ,, Nirmalchandra Dutta.
1940-1941— ,, Sukumar Mukherjee.
1941-1942— ,, Biswanath Banerjee.
1942-1943—Sri Prafullakumar Chaudhuri.
1943-1944— ,, Samar Dutta.
1944-1945— ,, Samarendrakumar Chaudhuri.
1945-1946— ,, Haridas Basu.
1946-1947— ,, Ranjit Ghosh.
1947-1948— ,, Durgaprasanna Chakravarty.
1948-1949— ,, Birendranath Mukherjee.
1949-1950— ,,
{ Debaprasad Chowdhury.
{ Chandi Sadhan Basu.
1950-1951—Sri Chandra Kumar Banerjee.
1951-1952— ,, Madanlal Jhunjhunwala
1952-1954— ,, Ajit Kumar Chatterjee.

GENERAL SECRETARIES

1928-1929—Sri Abinash Bhattacharyya.
1929-1930— ,, Sreepada Majumdar.
1930-1931— ,, Prasun Ghosh.
1931-1932— ,,
{ Kamaleschandra Banerjee.
{ Mrityunjay Prasad Basu.
1932-1933— ,, Sushantakumar Sen.
1933-1934— ,, Sudhirchandra Deb.
1934-1935— ,, Saradindukumar Niyogi.
1935-1936— ,, Satyen Home.
1936-1937— ,, Chittaranjan Misra.
1937-1938— ,, Sudhishkumar Roy.
1938-1939— ,, Harendrakisore Chatterjee.
1939-1940— ,, Sibendrakumar Basu.
1940-1941— ,,
{ Bimalchandra Dutt (*Resigned*).
{ Suhrid Dutta.
1941-1942—Sri
{ Kumudkanta Ray (up to November).
{ Sunilkanti Pal.
1942-1943— ,, Robin Mitra.
1943-1944 ,, Siddhartha Roy.
1944-1945— ,,
{ Amalkumar Sen (up to November).
{ Bhaskar Mitra.
1945-1946— ,, Amaresh Mukherjee.
1946-1947— ,, Biswanath Bajpayee.
1947-1948— ,, Rabin Basak.
1948-1949— ,, Durgaprasanna Chakravarty.
1949-1950— ,, Asoke Krishna Dutt.
1950-1951— ,,
{ Satya Narayan Roy (*Resigned.*)
{ Lenin Roy
1951-1952— ,,
{ Sahdeo Misra (*Retired*).
{ Amal Krishna Saha (*Offg*).
1952-1954— ,,
{ Sk. Sajjad Ali (*Retired*).
{ Hrishikesh Sarkar.

Published by Sri Ajit Kumar Chatterjee, Editor, from the Calcutta University Law College Union, Darbhanga Buildings, Calcutta 12, and Printed at Alliance Press, 6, Waterloo Street, Calcutta-1.

Endurance ...
First Prize — ,, Gobinda Lal Mukhuty
Second Prize — ,, Gaur Mohan Kundu
Third Prize — ,, Matilal Bhowmick

We observed the 28th Anniversary of the Gymnasium on the 12th September, 1953 with a grand performance. The main attraction of the performance was a *tableau*. With music and dialogue, the different muscles and poses of the body were demonstrated. This was highly appreciated by the audience. Our Vice-Principal kindly presided over the function, and Sri Hemendra Prasad Ghosh was the Guest-in-chief. On the eve of the function Sri Sachin Basak was awarded the College Blue by the Vice-Principal.

Our Gymnasium has been enriched by the addition of some new instruments and we are glad to announce that we have repaired all the instruments which were damaged by prolonged use.

In order to fulfil the long-felt need of a constitution of its own, our Gymnasium elected a committeee for preparing a draft constitution. The drafting committee consists of the following students.

Sri Monotosh Roy (ex-officio)
,, Dilip Krishna Mittra
,, Bishnu Jana
,, Rathin Mittra
,, Jiten Das

A committee consisting of the following members was elected by members of the Gymnasium was conducted the annual competitions:

Sri Monotosh Roy (ex-officio)
,, Gobinda Lal Mukhuty
,, Pratyush Ghosh
,, Bishu Chowdhury
,, Ajit Ghosh
,, Anshuman Ganguly
,, Harinarayan Mukherjee
,, Jagadish Ghosh
,, Subimal Das

Joint Secretaries
Delip Krishna Mittra
Govindalal Mukhuty

(*Continued from Page* 129)

present Bengal team in the National Championship **for the fourth time** in succession. We all congratulate him for this unique honour.

Our Basket Ball Team under the captaincy of Sri P. C. Ninan has won the Inter-Collegiate chamionship for the third time. In an exciting final we defeated St. Xaviour's College by 33-21 points. Sri P. C. Ninan, P. M. John and Sri K. M. Mathew gave a sparkling display.

With a goodly number of entrants, the Annual Sports came off successfully at the University Ground. The Hon'ble Mr Justice J. P. Mitter was the chief-guest and Dr. B. Roy Chowdhury presided. Sri Arun Mitter captured the individual honours. In the Professors' Race, Dr. B. N. Mukherjee **romped home** to take the first place with Prof. Dipak Sen a good second and Prof. S. A. Masud third.

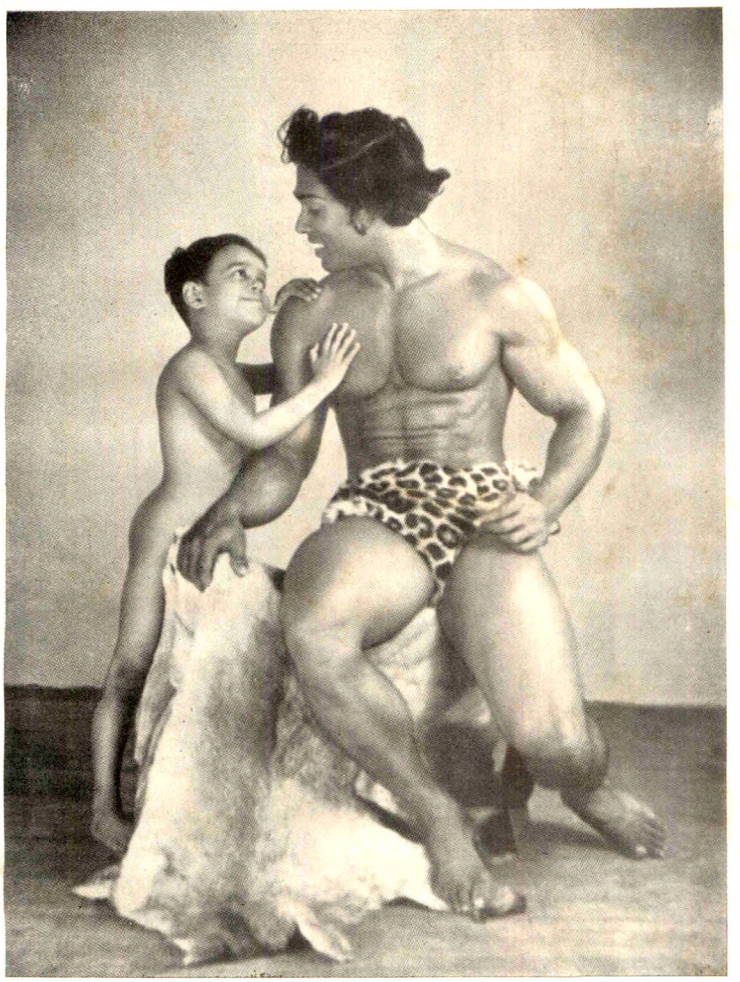
Before we close may we take this opportunity of thanking Pradeep Guha Thakurta, Amal Dutta, Ramanuja Roy and Asim Banerjee and a host of others too numerous to be mentioned for lending their unfailing co-operation in bringing about the year to a successful close. Our thanks are also due to Professors S. A. Masud, P. C. Chunder, D. Sen, B. N. Mukherjee and Dr. B. Roy Chowdhury for their untiring encouragement they were always ready to offer and which will be continued to be given to us in the years to come. We wish to express particular thanks to Sri Mrityunjay Basu, Supdt. of the College and Sri Sribhushan Mittra for their assistance and guidance whenever we are in need of them.

To Sri Amar Banerjee, Runu Guha Thakurta, Bibhuti Chatterjee and Monoj Mukherjee we owe sincere gratitude for their help. To all these gentlemen much of the credit for our success is due.

Asim Kumar Biswas,
Benoy Kumar Sarkar,
Jt. Secretaries.

"What is lovely never dies,
But passes into other loveliness."

—*Aldrich.*



Mr. UNIVERSE Sri MONOTOSH ROY
(Instructor, Law College Gymnasium)
with his son.

—*Photo by :* Universal
Art Gallery.

Magazine bound by Abdul Shovan, (Law College Daftari
21, Alimuddin Street, Calcutta—16.